(11)

No. 05-1508
Title: Zuni Public School District No. 89, et al., Petitioners
v.
Department of Education, et al.
Docketed: May 30, 2006
Lower Ct: United States Court of Appeals for the Tenth Circuit
Case Nos.: (01-9541)
Decision Date: February 23, 2006

Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
May 24 2006	Petition for a writ of certiorari filed. (Response due June 29, 2006)
Jun 21 2006	Order extending time to file response to petition to and including July 31, 2006, for all respondents.
Jul 31 2006	Brief of Federal Respondent in opposition filed.
Jul 31 2006	Brief of respondent New Mexico Public Education Department in opposition filed.
Aug 16 2006	DISTRIBUTED for Conference of September 25, 2006.
Sep 26 2006	Petition GRANTED.
Oct 31 2006	SET FOR ARGUMENT ON Wednesday, January 10, 2007.
Nov 9 2006	Joint appendix filed.
Nov 9 2006	Brief of petitioner Zuni Public School District No. 89, et al. filed.
Nov 24 2006	Record received from U.S.C.A. for 10th Circuit. (1 box)
Nov 29 2006	CIRCULATED.
Dec 4 2006	Motion for divided argument filed by respondents Department of Education, et al. (Distributed)
Dec 11 2006	Motion for divided argument filed by respondent GRANTED.
Dec 14 2006	Brief of respondent Federal Respondent filed. (Circulated.)
Dec 14 2006	Motion for leave to file amici brief filed by Public School Districts. (Distributed)
Dec 14 2006	Brief of respondent New Mexico Public Education Department filed. (Distributed)
Dec 14 2006	Brief amicus curiae of Alaska filed. (Distributed)
Dec 29 2006	Reply of petitioner Zuni Public School District No. 89, et al. filed. (Distributed)
Jan 5 2007	Motion for leave to file amici brief filed by Public School Districts GRANTED.
Jan 10 2007	Argued. For petitioners: Ronald J. VanAmberg, Santa Fe, N.M. For federal respondent: Sri Srinivasan, Assistant to the Solicitor General, Department

of Justice, Washington, D.C. For state respondent: Leigh M. Manasevit, Special Assistant Attorney General, Washington, D.C.

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Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89 AND GALLUP-MCKINLEY COUNTY SCHOOL DISTRICT NO. 1,
Petitioners,

v.

UNITED STATES DEPARTMENT OF EDUCATION,
Respondent,

NEW MEXICO STATE DEPARTMENT OF EDUCATION,
Intervenor.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Federal Impact Aid Program, 20 U.S.C. § 7709, was enacted to subsidize local State school districts which have a federal presence within the district such as military bases or, as in the present case, Indian Reservations. These local districts are not able to tax such federally impacted lands. The Impact Aid Program prohibits the State from counting these federal subsidies as part of an impacted district's budget when the State allocates operational funds to the local districts, unless the State's operational funding to districts throughout the State is "equalized" under an equalization formula under the Impact Aid Program. If the State's operational funding is determined to be "equalized," the State can reduce operational funding to an impacted district by the amount of the Impact Aid subsidy.

In 1994, the equalization formula was statutorily created and effectively repealed the equalization formula previously created by the Secretary of the United States Department of Education by regulation. However, in 1996, the Secretary, by regulation, reinstated his repealed and cc `flicting equalization formula and refuses to follow Congress' equalization formula. Under Congress' formula, New Mexico is not "equalized" and the intended beneficiaries receive the Impact Aid. Under the Secretary's formula, New Mexico is deemed "equalized" and the Impact Aid is taken from the impacted districts. The impacted districts are losing approximately $50,000,000 per year in Impact Aid. The Tenth Circuit was split 6 to 6 on the question, leaving the Secretary's formula in effect.

The question presented is:

1. Whether the Secretary has the authority to create and impose his formula over the one prescribed by

Congress and through this process certify New Mexico's operational funding for fiscal year 1999-2000 as "equalized," thereby diverting the Impact Aid subsidies to the State and whether this is one of the rare cases where this Court should exercise its supervisory jurisdiction to correct a plain error that affects all State school districts that educate federally connected children.

PARTIES TO PROCEEDINGS

Petitioners are New Mexico public school districts.

Respondent is the United States Department of Education.

Intervenor is the New Mexico State Department of Education.

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MISCELLANEOUS

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Petitioners Zuni Public School District No. 89 and Gallup-McKinley County Public School District No. 1 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The *Per Curiam* ruling of the United States Court of Appeals for the Tenth Circuit dated February 23, 2006 is officially reported at 437 F.3d 1289 and is reproduced in App. at 2a.

The Opinion of the United States Court of Appeals for the Tenth Circuit dated December 30, 2004 was vacated and is reproduced in App. at 3a.

The decision of the Secretary of the United States Department of Education dated October 11, 2001 is reproduced in App. at 34a.

JURISDICTION

The order of the United States Court of Appeals for the Tenth Circuit sought to be reviewed was entered on February 23, 2006. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. § 1254. Federal jurisdiction is invoked under 20 U.S. C. § 7711(b)(1) which allows appeals of decisions of the Secretary to the United States Court of Appeals.

STATUTORY PROVISIONS INVOLVED

The statutory and regulatory provisions relate to the federal Impact Aid Program and are:

1. 20 U.S.C. § 240(d) repealed (App. at 69a)
2. 20 U.S.C. § 7709 (2000) (App. at 59a)
3. 34 C.F.R. Part 222, Subpart K (2000) (including App. to Subpart K) (App. at 76a)
4. Former 34 C.F.R. §222.63 (1993) (App. at 97a)
5. Former 34 C.F.R. App. §222 (1993) (App. 99a)

STATEMENT OF THE CASE

The Zuni Public School District is a New Mexico public school district located entirely within the Pueblo of Zuni Reservation. It has virtually no tax base. Over 65% of the Gallup-McKinley County Public School District No. 1 consists of Navajo Reservation lands which are also not taxable by State school districts. Under the Impact Aid Program (20 U.S.C. § 7709 *et seq.*) public school districts such as Zuni and Gallup impacted by a federal presence which reduces ordinary bonding and taxing capacity are entitled to receive federal Impact Aid funding to offset the negative financial impact of this federal presence. *Indian Oasis-Baboquivari Unified School District No. 40 of Pima County v. Kirk*, 91 F.3d 1240 (9th Cir. 1996). The Impact Aid Program, however, allows States to take credit for the Impact Aid payments by correspondingly reducing operational funding to Impact Aid districts if the State can establish that operational funding for its school districts (statutorily referred to as LEAs) is otherwise "equalized." Under Congress' 1994 formula (the current statutory formula) a 25% disparity in per-student funding is permitted between the highest funded LEA and the lowest funded LEA in a field of LEAs identified

under the statutory formula. Under this formula, all LEAs are first ranked by per-student funding. The Secretary of the United States Department of Education (the "Secretary") is then instructed by statute to "disregard local educational agencies (LEAs) with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State. . . ." (20 U.S.C. § 7709(b)(2)(B)) (App. at 61a). The Secretary, however, has by regulation created a formula which uses a different method for developing this final field of LEAs. Congress' formula eliminates percentiles of "LEAs." The Secretary eliminates percentiles of "pupils," (App. at 92a) and is thereby able to develop a much reduced field of LEAs for use in making the equalization determination. This produces a radically different outcome than required by the statutory formula enacted in 1994.

The statutory formula was followed and reproduced by the Secretary in the body of the regulations at 34 C.F.R. 222.162(a) (Subpart K) (App. at 81a). Under the statute and the body of the regulation, in making the "equalization" determination the Secretary is to "disregard LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State." (App. at 81a). The Appendix to this regulation provides what purports to be an example of a calculation made under the statutory and regulatory formula. However, instead of reflecting the statutory formula, the Appendix example uses the Secretary's pre-1994 equalization formula created by regulation in 1976 but which was specifically repudiated by the 1994 statute. Under the Appendix formula, instead of disregarding "LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile. . .," as required by the Congress, the top 5% and bottom 5% of "pupils" are eliminated to determine the LEAs to be used in

the final calculation.[1] (App. at 92a) The Secretary insists on following the Appendix formula.

Under Congress' formula, New Mexico's operational funding is not "equalized" and New Mexico's federally impacted districts are entitled to retain their share of approximately $50,000,000 of Impact Aid funds without suffering offsetting reductions in their State provided operational funding. Under the Secretary's formula, more than twice as many LEAs are excluded from the final field, New Mexico's funding is deemed "equalized," and New Mexico is permitted to reduce operational funding to the federally impacted districts by the amount of their Impact Aid receipts.[2] To further allow a State to qualify for the equalization exception, weighted funding from the State to LEAs to help cover costs associated with unique conditions found in certain LEAs such as low student count, urban density, rural location, etc. (34 C.F.R. § 222.162(c)(2)) is backed out to establish a base funding level (App. at 82a). Even with this weighted funding backed out, in New Mexico the highest per student operational funding for all LEAs is $6,520 and the lowest is $2,672 per student, a disparity of approximately 244% (App. at 212a). Under Congress' formula, 10 LEAs of the 89 LEAs are eliminated to form the final field. (App. at 24a). Under the Secretary's formula, 25

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[1] Under the example in the Secretary's Appendix, LEAs are ranked in order of wealth. Five percent of the entire State student population is eliminated from the top ranked LEAs and then bottom ranked LEAs. As students are subtracted, LEAs are eliminated and the remaining field of LEAs is established. In stark contrast, under the statute, percentiles of LEAs are eliminated without reference to pupils.

[2] New Mexico by statute takes credit for 75% of the Impact Aid payments. NMSA 1978 § 22-8-25. (App. at 72a)

out of 89 LEAs (or approximately 28% of all LEAs) are eliminated and the disparity is reduced to 14.43%. (App. at 45a-46a)

The legislative and regulatory sequence is as follows.

1. Prior to 1974, all Impact Aid went to the recipient school districts.

2. In 1974, Congress enacted 20 U.S.C. § 240(d), which was later repealed. (App. at 69a) This allowed States to take "into consideration, Impact Aid payments, provided there were equalized operational expenditures made to school districts." The term "equalized expenditures" was to be "defined by the Secretary by regulation." (App. at 70a)

3. In 1976, the Secretary conducted a series of "comments and responses" relating to the formulation of the regulations. One exchange discussed whether it was preferable to eliminate percentiles of LEAs or percentiles of pupils in developing the final field of LEAs. Some experts recommended the percentile elimination of LEAs. Others recommended the percentile elimination of pupils. The Secretary chose to eliminate percentiles of pupils. (App. at 129a-131a)

4. The Secretary then published the "equalization" regulation in 1976 (App. at 141a). The Secretary, in the body of the regulation (§ 115.62(b)), established the disparity limit at 25%, but did not further define the process except through the Appendix to the regulation. (App. at 99a, 159a)

5. The Appendix provided:

> Identifying those local agencies in each ranking which fall at the 95th and 5th percentile of the total number of pupils in attendance in the schools of these agencies. . .. (Emphasis added)

6. In 1993, this regulation was codified as 34 C.F.R. § 222.63. (App. at 97a)

7. In 1994, the system changed with the enactment of 20 U.S.C. § 7709. This statute removed the Secretary's authority to establish the equalization formula. Instead, a new and different equalization formula was created by statute. Now, instead of eliminating pupils above the 95th percentile and below the 5th percentile, the statute required the Secretary to "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile" (§ 7709(b)(2)(i)) thus reversing the Secretary's 1976 decision to eliminate pupils instead of LEAs. (App. at 61a)

8. The Secretary subsequently enacted regulation 34 C.F.R. § 222.162(c) (Subpart K) the body of which mirrored the 1994 statutory change. (App. at 76a, 81a)

9. However, the Secretary then followed with an Appendix to the regulation. That Appendix purported to provide an example of how the statutory formula was to be applied. In the example set out in the Appendix, instead of disregarding "LEAs with per pupil expenditures or revenues above the 95th percent

> -or below the 5th percentile . . ." as required by the statute, the Secretary eliminated the top 5% and bottom 5% of "pupils," repeating virtually verbatim the 1976 formula and defying Congress' clear change. (App. at 92a)

Impact Aid funding in New Mexico in 1999-2000 was approximately $62,671,000[3], went to 30 of 89 LEAs and was about 2.7% of New Mexico's total operational budget.[4] Impact Aid is provided to every State in the country which is impacted by a federal presence. However, only New Mexico, Kansas and Alaska currently attempt to take credit for the Impact Aid in distributing their other operational funds to LEAs.

An annual certification hearing before the United States Department of Education is conducted to determine whether a State's operational funding is equalized. This hearing was conducted for fiscal year 1999-2000 and objection was made to the Secretary's use of the formula in the Appendix as opposed to the statutory formula. (App. at 222a) The Secretary insisted on using the Appendix formula and New Mexico's funding was determined to be "equalized." (App. at 41a) Petitioners sought a hearing before a United States Department of Education administrative law judge pursuant to procedures set forth in 20 U.S.C. § 7711(a). Hearings were conducted before the administrative law judge who shared Petitioners' concern that the Appendix being followed by the Secretary could not be reconciled with the statutory formula. At the conclusion of the hearing, however, the administrative law judge questioned whether, as an employee of the United States Department of Education, he could invalidate the

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[3] App. at 226a, 234a

[4] App. at 234a-236a

Appendix created by the Secretary, citing certain judicial precedent. Ultimately, the administrative law judge ruled that he did not have that power and could not rule on the validity of the formula in the Secretary's Appendix. (App. at 43a) That decision was appealed to the Secretary seeking to prohibit use of his Appendix. The appeal was denied. (App. at 34a)

Petitioners appealed to the Tenth Circuit Court of Appeals pursuant to 20 U.S.C. § 7711(b)(1). A three judge panel of the Tenth Circuit Court of Appeals issued its opinion on December 30, 2004. Two of the judges affirmed the decision of the Secretary and one judge dissented. (App. at 3a) Petitioners successfully petitioned for rehearing en banc. The decision of the three judge panel was withdrawn. Months after a second oral argument, the Tenth Circuit announced that the 12 members of the *en banc* panel were evenly divided and no decision would be issued. (App. at 2a) The decision of the Secretary stood by default. Accordingly, the only articulated review on the merits the Petitioners have received is from the Secretary of the Department of Education sitting in a quasi-judicial capacity judging a challenge to his own actions.

REASONS FOR GRANTING CERTIORARI

I. THE STATUTES AND REGULATIONS

The pertinent parts of the relevant statutes and regulations are reproduced in the Appendix and display a statute and a regulatory appendix which are irreconcilable.

Petitioners understand that a detailed analysis of the merits of a case is not always the appropriate vehicle for convincing this Court to accept a Petition for Writ of Certiorari.

However, in this instance, an analysis of the merits establishes the clear wrong being committed by the Secretary, invokes the strong public policy against an administrative agency defying an act of Congress and doing as it pleases and reveals the resulting substantial economic loss of federally impacted districts for whom the Impact Aid Act was created.

II. THE IMPACT AID FORMULA AND *CHEVRON* ANALYSIS

The Impact Aid Program, 20 U.S.C. § 7709, prevents the State from taking credit for Impact Aid payments in determining the amount of operational funding to be allocated to a federally impacted LEA.[5] An exception exists for a State with "a program . . . that equalizes expenditures for free public education among local educational agencies in the State." 20 U.S.C. § 7709(b)(1). A State's educational spending is equalized "if . . . the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25%." 20 U.S.C.

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[5] 20 U.S.C. § 7709(a) General Prohibition

Except as provided in subsection (b) of this section, a State may not –

(1) consider payments under this subchapter in determining for any fiscal year –

(A) the eligibility of a local educational agency for State aid for free public education; or

(B) the amount such State aid; or

(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would received if such agency were not so eligible.

§ 7709(b)(2)(A). In developing the field of LEAs against which this percentile differential is developed, the Secretary is required to "disregard local educational agencies [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B)(I). As the dissent in the withdrawn Tenth Circuit Court of Appeals Opinion (App. at 24a-29a) put so succinctly:

> These requirements are unambiguous. A percentile is a mathematical concept not admitting of multiple interpretation; it is a simple, straightforward method of ranking an array of values. Attached to this dissent is Exhibit A. (App. at 30a) It lists all of the 89 New Mexico LEAs along with the per-pupil revenues for each. Analysis of that array yields a value of $3,650.40 for the 95th percentile and $2,803.80 for the 5th percentile. Five districts are above the 95th percentile and five districts fall below the 5th percentile; they are excluded from further analysis. After the exclusion, Gadsden district has the lowest per-pupil revenues ($2,829). When those revenues are multiplied by 125%, the result is $3,536, an amount less than the highest non-excluded district, Maxwell – with per-pupil revenues of $3,591. The 25% test is not met. New Mexico has not equalized school funding as statutorily required. Therefore, federal Impact Aid cannot be counted as part of the LEAs resource.

Contrasted against Congress' formula is the Secretary's formula described by the dissent as "complex and mystifying." (App. at 25a) Here, the Secretary does not eliminate percentiles of LEAs. Instead, the Secretary replaces Congress' percentiles of LEAs with percentiles of pupils. The

LEAs are ranked in accordance with wealth. Then the Secretary eliminates the top 5% of the pupils of those ranked LEAs. As the pupils are eliminated, so are the LEAs with which they are associated. The same process is applied to pupils at the bottom of the ranking. This clearly conflicts with the Congressional mandate. Initially, it is bewildering why the Secretary would eliminate percentiles of pupils (Why not eliminate percentiles of teachers or administrators or football fields?). However, the statutory and regulatory history is revealing. The Secretary apparently took umbrage at Congress removing his authority to establish the equalization formula and repealing the formula which the Secretary had previously developed through regulation. The Secretary repeated the 1994 statutory equalization formula in the body of his regulation, but then installed, almost verbatim, his pre-1994 formula in the example set forth in his Appendix, apparently believing that his defiance of Congress would go undetected. It almost did.

Whether the Secretary has exceeded his statutory authority in creating and following his Appendix equalization formula is determined under the two step test established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). That analysis distinguishes between the absence of authority to act and the arbitrary exercise of valid authority. Step one addresses the existence of agency authority. Step two, addressed only if the agency has authority, tests whether the exercise of such discretion is arbitrary and capricious.

The Secretary in these proceedings has glided over step one and argues that eliminating pupils instead of LEAs is a reasonable approach and deserving of deference. However, the Secretary does not identify the source of his authority to countermand a federal statute which removed his former

authority to create the equalization formula and by the same statutory action mandated that the equalization formula involve the elimination of LEAs and not pupils, a significant distinction and the subject of pre-regulation policy discussions in 1976. There is no such authority. It is "axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). "[N]o matter how important, conspicuous, and controversial the issue, and regardless of how likely the public is to hold the Executive Branch politically accountable, . . . an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 161 (2000) (internal quotations omitted); *see also Louisiana Pub. Serv. Comm'n v. Federal Communications Commission*, 476 U.S. 355, 374 (1986) ("an agency literally has no power to act . . . unless and until Congress confers power upon it").

Chevron is clear in its holding:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether an agency's answer is based on a permissible construction of the statute. *Id.* at 842-43

Even if one could read an ambiguity into Congress' formula, this is not a license for the Secretary to do as he pleases. A permissible construction is one consistent with the statute. *Manning v. U.S.*, 146 F.3d 808 (10th Cir. 1998). *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979). "*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to authority Congress has delegated to the official. *Gonzales v. Oregon*, at ___ U.S. ___, 126 S. Ct. 904, 916 (2006); *United States v. Mead Corporation*, 533 U.S. 218, 226-227 (2001). The 1994 legislation makes clear that the Secretary was divested of his authority to continue using the old equalization formula and diverting Impact Aid funds from impacted districts to the State. *See, Gonzales v. Oregon*, ___ U.S. at ___, 126 S.Ct. at 921.

The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. "Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Assns., Inc.*, 531 U.S. 457, 468 (2001); *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.")

In the case at bar, Congress in 1994 rescinded the Secretary's authority to establish the equalization formula and mandated use of a different formula. The Secretary is required to use Congress' formula, not ignore it and then

reassert his statutorily repealed formula.[6] This action of the Secretary involves more than administrative overreaching. The Secretary cannot maintain with any candor that there is sufficient flexibility within Congress' legislation to allow the Secretary to create an equalization formula that eliminates percentiles of pupils and not LEAs. The difference between these approaches was a significant focus of discussion thirty years ago when the Secretary was developing his original regulations. It is absolutely clear in the historical context of the development of the equalization formula, eliminating percentiles of LEAs precludes elimination of percentiles of pupils. "Ambiguity is a creature not of definitional possibilities but of statutory context." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 133, *Davis v.*

[6] It is noteworthy that while the Secretary requests and in fact needs unprecedented deference to support his position, the regulatory process he conducted in 1995 reveals the request to be disingenuous. In his own published regulations (App. at 163a-164a), the Secretary claimed that his new regulations had no significant economic impact and were essentially busy work of little consequence, qualifying the regulatory process for an exception under 5 U.S.C. §533(b)(B) from public notice and comment requirements when such process is "unnecessary" or "contrary to the public interest." The Secretary did not even contend that his regulations qualified for the public notice and comment exception under 5 U.S.C. §533(b)(A) when the proposed regulations are "interpretative." With the Secretary's 1995 regulations not even being "interpretative," no deference should be paid to these regulations as being useful in interpreting a federal statute. Even interpretative regulations are generally only given deference to the extent they interpret an agency's own regulations, not a federal statute. *Auer v. Robbins*, 519 U.S. 452, 461-462 (1997); *Gonzales v. Oregon*, ___ U.S. at ___, 126 S.Ct. at 916. Also, "regulations . . . not promulgated as substantive rules . . ." do not have the "binding effect of law." *Chrysler Corp. v. Brown*, 441 U.S. at 315.

Michigan Department of the Treasury, 489 U.S. 803, 809 (1989).

The Secretary's formula finds no Congressional support and is of no force or effect. *Gonzales v. Oregon, supra* (regulation enacted by United States Attorney General attempting to regulate controlled substances was invalid due to lack of authority); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. at 126 ("Regardless of how serious the problem an administrative agency seeks to address, however, it may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" FDA regulations purporting to control the tobacco industry struck down.)

III. CONFLICT WITHIN THE TENTH CIRCUIT COURT OF APPEALS AND FAILURE TO HAVE A SUBSTANTIVE AND DEFINITIVE REVIEW OF THE SECRETARY'S ACTION.

A three judge panel of the Tenth Circuit Court of Appeals initially issued a majority decision which confirmed the decision of the Secretary of the Department of Education. The dissenting judge issued a vigorous and pointed dissent. The Petitioners sought an *en banc* review. It was granted and the Tenth Circuit decision was withdrawn in its entirety. Twelve judges participated in the *en banc* review. The Court reported that the panel was evenly divided and could not issue a decision on the merits. The original Tenth Circuit decision was vacated and by default the Secretary's decision was affirmed. One consideration in determining whether a petition for certiorari should be accepted is a divided appellate court. *Oil Workers Union v. Mobile Oil Corp.*, 426 U.S. 407 (1976); *Communications Workers America, et al., v. Beck, et al.*, 487 U.S. 735 (1988); and *Rinaldi v. United States*, 434

U.S. 22 (1977). In *Ratchford, President, University of Missouri, et al., v. Gay Lib, et al.*, 434 U.S. 1080 (1978), Justices Rehnquist and Blackmun joined in a written dissent to a decision of the majority of the Supreme Court to deny certiorari.

> Courts by nature are passive institutions and may decide only those issues raised by litigants in lawsuits before them. The obverse side of that passivity is the requirement that they do dispose of those lawsuits that are before them and entitled to attention. The District Court and the Court of Appeals were doubtless as chary as we are of being thrust in the middle of this controversy but were nonetheless obligated to decide the case. Unlike the District Court and the Court of Appeals, Congress has accorded to us through the Judiciary Act of 1925, 28 U.S.C. §1254, the discretion to decline to hear a case such as this on the merits without explaining our reasons for doing so. But the existence of such discretion does not imply that it should be used as a sort of judicial storm cellar to which we may flee to escape from controversial or sensitive cases. *Id.* at 1081.

One possible interpretation of the action or lack thereof by the Tenth Circuit Court of Appeals is that six of the judges did not want to disturb the status quo but could not author a credible decision which supported the Secretary's actions. Petitioners believe that an issue of such magnitude and consequence should receive meaningful review. This need is not met by a quasi-judicial review by the Secretary of his own actions.

VI. IMPORTANCE OF IMPACT AID TO RESERVATION DISTRICTS AND MILITARY DISTRICTS

The Impact Aid Program was created to "fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that *promotes control by local educational agencies with little or no Federal or State involvement.*" 20 U.S.C. § 7701 (emphasis added). The merits of this case are clear. Congress created one equalization formula and the Secretary insists on using another. Given the legislative and regulatory history and the obvious differences between the Secretary's and Congress' equalization formulas, the controversy within the Tenth Circuit must have centered around something other than the merits of the case. Perhaps it was thought to be more important for New Mexico to be able to rely upon Impact Aid to fund its general educational operations than for impacted LEAs to receive the Impact Aid. While Congress' wisdom should never be a judicial issue, apparently it has been in these proceedings.

New Mexico could adjust its operational funding system so that it is equalized. It has chosen not to do so. Including all 89 LEAs, a 244% disparity in per student funding exists between the top ranked LEA and the bottom ranked LEA. No policy reason for such a disparity has ever been articulated. Also, if the impacted districts receive their Impact Aid, Gallup-McKinley moves to about the middle of the rankings in expenditures per student, Zuni moves to fourth from the top and the district of Alamogordo, which contains a military base, moves up about four positions. (App. at 212a, 226a and 234a)

Most importantly, educating Native American children in rural, isolated environments involves special problems stemming from poverty, social conditions, language differences and cultural differences. A compromised or, in Zuni's case, a non-existent bonding and taxing capacity resulting from a federal presence has far reaching consequences. New Mexico's capital improvement funding system has been declared unconstitutional by a New Mexico District Court (App. at 227a) and the ongoing attempts by the Legislature to meet the District Court mandate continues to be monitored by the District Court. Property taxes, bonds and mill levies are major sources for districts with healthy bonding and taxing capacities to fund capital improvements. Those without such bonding capacities have limited options. Without quality facilities, including staff housing, isolated districts have difficulty attracting and retaining staff. Further, to attract staff, these districts must devote a greater percentage of their budget to salaries. Even with this, the turn over rate for staff remains high. Under New Mexico's operational funding system, additional payments are made to districts which employ experienced and advanced degreed teachers. This additional funding is substantial.[7] The result is that the "desirable" districts easily retain their teachers and receive additional funding to support their higher salaries, while the impacted district does not receive the additional funding but has to pay the higher salaries, thus diverting funds needed for other programs. While Impact Aid retained by New Mexico is only 2.7% of its operational budget, spreading an additional $50,000,000 around the thirty impacted districts would ease

[7] *See*, App. at 237a, NMSA 1978 §§22-8-4 and 22-8-25D.(4). The training and experience index which ranges between 1.000 and 1.316 is used to multiply units (essentially per student funding). For 10,000 units, Gallup's training and experience index would produce an extra $934,800, while a higher training and experience index of 1.271 would produce an extra $6,666,600.

some of the disability under which they operate and achieve the Congressional purpose underlying the Impact Aid program.

V. THIS COURT'S SUPERINTENDING CONTROL

The administrative law judge and the Tenth Circuit Court of Appeals failed to substantively rule on the actions of the Secretary. It is assumed that the Secretary would in a quasi-judicial capacity defend his own administrative actions. However, one assumes that the judiciary would not be similarly predisposed and a fair judicial review of the Secretary's actions under the *Chevron* standard would occur. To date there has been no substantive review and explanation of the Secretary's actions.

Petitioners submit that this is a matter of compelling importance, as the decision of the Secretary to impose his unauthorized formula will undoubtedly be repeated every year during the federal certification process, and has been in the years following 2000. Allowing New Mexico and perhaps other jurisdictions to qualify for the exception under an unauthorized construction of the Impact Aid Program at the expense of Congress' intended beneficiaries should be compelling reason for this Court to exercise its supervisory power and decide this matter on certoriari. *See*, *Florida v. Rodriguez*, 469 U.S. 1, 7 (1984), where Justice Stevens stated:

> As the Court of last resort in the federal system, we have supervisory authority and therefore must occasionally perform a pure error-correcting function in federal litigation.

Petitioners' claim goes far beyond a request for pure error correction.

Further, this appeal to the Tenth Circuit related to a certification determination for the fiscal year 1999-2000. It is now 2006. For each of the approximately six years that have since passed, the Secretary has continued to impose the Appendix formula and determined that New Mexico is equalized. Administrative appeal proceedings, however, have been stayed pending the final outcome of this fiscal year 1999-2000 appeal and now this application for certiorari. If certiorari is not granted, then a hearing will be conducted before the administrative law judge for the fiscal year 2000-2001 and, assuming the same result, another appeal will be brought before the Tenth Circuit. Until there is a change in the collective mind or the composition of the Tenth Circuit, there will continue to be repeats of this futile ritual. Until a dispositive judicial review of the Secretary's actions occurs, a clear impropriety will persist.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-9541

[Filed February 23, 2006]

ZUNI PUBLIC SCHOOL DISTRICT NO. 89; GALLUP-MCKINLEY COUNTY PUBLIC SCHOOL DISTRICT NO. 1, Petitioners,	)
vs.	)
UNITED STATES DEPARTMENT OF EDUCATION, Respondent.	)
NEW MEXICO STATE DEPARTMENT OF EDUCATION, Intervenor.	)

ON REHEARING EN BANC FROM A DECISION
OF THE SECRETARY OF THE UNITED STATES
DEPARTMENT OF EDUCATION
(Docket No. 99-81-I)

Before TACHA, Chief Judge, SEYMOUR, EBEL, KELLY, HENRY, BRISCOE, LUCERO, MURPHY, HARTZ, O'BRIEN, McCONNELL, and TYMKOVICH, Circuit Judges.

OPINION

PER CURIAM.

Two local educational agencies (LEAs) (Zuni Public School District No. 89 and Gallup-McKinley Public School District No. 1) filed a petition for review from the Secretary of Education's decision that the State of New Mexico was equalized pursuant to 20 U.S.C. § 7709(b) and the corresponding regulations at 34 C.F.R. § 222.162(a). *See also id.* pt. 222, subpt. K, app. A divided panel of this court denied the petition for review. *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 393 F.3d 1158, 1169 (10th Cir. 2004). We granted rehearing en banc, and in accordance with our local rule, the judgment was vacated, the mandate stayed and the case was restored as a pending appeal. 10th Cir. R. 35.6. On rehearing en banc, the decision of the Secretary is affirmed by an equally divided court. The panel decision is hereby vacated. *See id.*

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 01-9541

[Filed December 30, 2004]

ZUNI PUBLIC SCHOOL DISTRICT NO. 89; GALLUP-MCKINLEY COUNTY PUBLIC SCHOOL DISTRICT NO. 1, Petitioners,	)
v.	)
UNITED STATES DEPARTMENT OF EDUCATION, Respondent.	)
NEW MEXICO STATE DEPARTMENT OF EDUCATION, Intervenor.	)

Petition for Review from a Decision of the
Secretary of the United States Department of Education
Docket No. 99-81-I

Before SEYMOUR, HENRY and O'BRIEN, Circuit Judges.

OPINION

SEYMOUR, Circuit Judge.

Zuni Public School District 89 (Zuni) and Gallup-McKinley County Public School District No. 1 (Gallup-McKinley) seek review of a final decision of the Secretary of Education which addressed whether, and to what extent, the State of New Mexico can consider its receipt of federal Impact Aid when making its own statewide distributions of educational funds. Both Zuni and Gallup-McKinley filed timely petitions for review of the Secretary's decision. We exercise jurisdiction pursuant to 20 U.S.C. § 7711(b)(1) and affirm.

I

In October 1999, Zuni filed an objection to a certification made by the Department of Education that the State of New Mexico was equalized pursuant to 20 U.S.C. § 7709(b) and the corresponding regulations at 34 C.F.R. § 222.162.[1] This

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[1] In outlining the general parameters for determining whether a state is equalized, 20 U.S.C. § 7709(b)(2) provides:

> (A) . . . [A] program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by . . . the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by . . . the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent. (B) . . . In making a determination under this subsection, the Secretary shall-- (i) disregard local

certification allows New Mexico to offset its contributions to local education agencies (LEAs),[2] including Zuni and Gallup-McKinley, by a proportion of the federal Impact Aid payments made to those LEAs. *See* 20 U.S.C. § 7702, 7703, 7709(d)(1)(B). In November 1999, Gallup-McKinley filed a similar objection with the Department, alleging that New Mexico took an inappropriate proportion of Impact Act funds

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> educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and (ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

20 U.S.C. § 7709(b)(2). The corresponding regulation uses similar language.

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

34 C.F.R. § 222.162(a).

[2] In New Mexico, local educational agencies (LEAs) are called school districts.

into consideration when determining state aid, in violation of 20 U.S.C. § 7709(d)(1) and 34 C.F.R. § 222.163(a).[3]

The objections of Zuni and Gallup-McKinley were consolidated for the purposes of administrative adjudication. An administrative law judge (ALJ) issued a decision sustaining the Department's certification and rejected all other arguments presented by Zuni and Gallup-McKinley. Both school districts appealed the ALJ's decision to the Secretary, who affirmed the ALJ's decision. We will discuss as necessary any additional relevant facts throughout the course of this opinion.[4]

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[3] Section 7709(d)(1) states:

> If a State has in effect a program of State aid for free public education in any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under this subchapter for any fiscal year may be taken into consideration by such State in determining the relative - (A) financial resources available to local educational agencies in that State; and (B) financial need of such agencies for the provision of free public education for children served by such agency, except that a State may consider as local resources funds received under this subchapter only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues.

20 U.S.C. § 7709(d)(1). The regulation re-articulates the statutory directive and also indicates that "[d]eterminations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State." 34 C.F.R. § 222.163(a).

[4] Due to its interest in this controversy, the State of New Mexico was permitted by the ALJ to intervene below. Likewise, this court

II

Zuni frames its challenge on appeal as "whether the United States Department of Education and State of New Mexico applied the mandatory statutory formula for determining whether a state has an equalized funding system for its schools which would entitle the state to take credit for federal Impact Aid funding." Aplt. br. at 2. As we will detail below, the Secretary determined the State of New Mexico was equalized under 20 U.S.C. § 7709, and reached this decision by reference to and application of the implementing regulations and appendix supporting the statute. *See* 34 C.F.R. § 222.162(a); 34 C.F.R. pt. 222, subpt. K, app. Thus, we must determine

> whether the text of the statute resolves the issue, or if not, whether the [Department's] interpretation [as evidenced by its application of the regulatory index] is permissible in light of the deference to be accorded to the agency under the statutory scheme. If the statute speaks clearly to the precise question at issue, we must give effect to the unambiguously expressed intent of Congress. If the statute is instead silent or ambiguous with respect to the specific issue, we must sustain the agency's interpretation if it is based on a permissible construction of the statute.

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granted New Mexico's motion to intervene as a party in this case on appeal. However, we deny New Mexico's October 30, 2003, motion to supplement the record with a supplemental appendix adding material that was not before the administrative agency.

Yellow Transp., Inc. v. Michigan, 537 U.S. 36, 45, 154 L. Ed. 2d 377, 123 S. Ct. 371 (2002) (quoting *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984); *Barnhart v. Walton*, 535 U.S. 212, 217-18, 152 L. Ed. 2d 330, 122 S. Ct. 1265 (2002)). In so doing, it is important for us to examine the current statute as well as its implementing regulations and appendix, and the history accompanying each.

Impact Aid is compensatory financial assistance paid by the United States to an LEA experiencing financial burdens because the LEA's ability to raise local revenues has been limited as a result of the real property within its boundaries having tax exempt status due to the property's acquisition by the federal government, or because the LEA educates children residing on, or whose parents are employed on federal property, including Indian lands. *See* 20 U.S.C. §§ 7701-7714.

Generally, states are prohibited from reducing the state aid they provide to their LEAs if the LEAs receive Impact Aid. *See* 20 U.S.C. § 7709(a). Pursuant to 20 U.S.C. § 7709(b), however, if a state is certified by the Department as having a program of state aid "that equalizes expenditures for free public education among local educational agencies in the State," *id.*, then the state is permitted to factor in the receipt of Impact Aid funds when making its own distributions of educational aid to its LEAs. The statute sets out a general disparity test to determine whether a state is equalized. Under this test, LEAs are ranked in descending order by their per-pupil expenditures or revenues. If the LEA that is ranked highest in terms of its per-pupil expenditures or revenues does not exceed the per-pupil revenues or expenditures of the lowest ranked LEA by more than twenty-five percent, then

the state qualifies as equalized under the statute. 20 U.S.C. § 7709(b)(2)(A).

In making this calculation, LEAs ranked at the extremes with the highest and lowest per-pupil expenditures are excluded. As directed by the statute, "local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," 20 U.S.C. § 7709(b)(2)(B)(i), are disregarded when determining whether a twenty-five percent disparity exists between the highest and lowest LEAs.

The exception detailed in 20 U.S.C. § 7709(b) allowing "equalized" states to take into consideration Impact Aid when making their own distributions of state aid first appeared in the Impact Aid laws in 1974. That statute used general language similar to that which appears in the current statute,[5] but instead of describing a disparity test, the 1974 statute expressly delegated to the Secretary the power to define the term "equalize expenditures." *See* 20 U.S.C. § 240(d)(2)(B) (1982).

In 1976, after engaging in the process of notice and comment rulemaking, the Secretary promulgated regulations in which it outlined the disparity test. It directed that a state would be deemed equalized if "the disparity in the amount of current expenditures or revenue per pupil for free public

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[5] *See* 20 U.S.C. § 240(d) (1982) (repealed by Pub.L. 103-182, Title III, § 333(b), Oct. 20, 1994, 108 Stat. 3965) ("[I]f a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State," Impact Aid payments may be taken into account.).

education among local educational agencies having similar grade levels in the State is no more than 25 per centum, as determined according to the procedures set forth in Appendix A to this subpart." 41 Fed. Reg. 26320, 26327 (June 25, 1976). Appendix A detailed the specific method by which to make the disparity determination. First, LEAs were ranked by expenditures or revenues per pupil, and then those LEAs which fell "at the 95th and 5th percentiles of the total numbers of pupils in attendance in the schools of those agencies," were eliminated. *Id.* at 26329. The twenty-five percent disparity comparison was then made between the remaining highest and lowest ranked LEAs. *Id.*

In the course of the 1976 notice and comment process, the Department of Education responded in length to a question regarding whether the ninety-fifth and fifth percentiles were to be calculated based on the total number of pupils in the state or by school districts. It stated that

> *the referenced percentiles are based on number of pupils*. [The regulation] provides that in calculating the disparity standard according to the procedures set forth in Appendix A, the districts in a State will be ranked on the basis of current expenditures or revenue per pupil, and that those districts which fall above the 95th and below the 5th percentile of those agencies in terms of the number of pupils in attendance in the schools of those agencies will be excluded for purposes of the calculation. *The percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of school districts.* However, it appears that the proposed regulation may not have been as clearly expressed as desired. In regard to the question of pupils versus districts for the percentages used in calculating the disparity standard, it is the

> Commissioner's view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

Id. at 26324 (emphasis added). In 1993, the 1976 regulations and the accompanying appendix were codified with substantially the same language in the Code of Federal Regulations. *See* 34 C.F.R. § 222.63 (1993), 34 C.F.R. pt. 222, subpt. K, app. (1993).

In 1994, the statute at issue in this case was passed, repealing and replacing 20 U.S.C. § 240(d). As noted above, the replacement statute, 20 U.S.C. § 7709, specifically details within its text the twenty-five percent disparity test, and also includes language setting out the basic parameters of the required ninety-fifth and fifth percentile determinations. This statutory language largely reiterates the disparity test and percentile determinations laid out in the earlier regulations and appendix. However, the percentile language appearing in the 1994 statute differs slightly from that which appeared in the earlier regulations. While the former appendix directed that the ninety-fifth and fifth percentiles should be calculated by "the total number of pupils in attendance in the schools" to determine which LEAs to eliminate, 34 C.F.R. pt. 222, subpt. K, app. (1993), the 1994 statute dictates that LEAs

"with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," 20 U.S.C. § 7709(b)(2)(B)(i), should be disregarded. Nothing in the legislative history for the 1994 changes to the law gives any indication as to what meaning, if any, should be ascribed to the language "above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," *id.*, when calculating whether a state is equalized. At most, the legislative history merely notes that the statute "prohibits a State from taking Impact Aid payments into account in determining the amount of State aid to be paid to LEAs that receive Impact Aid, unless that State has an equalization plan approved by the Secretary and describes the standard which State plans must meet." H.R. NO. 103-425, at 71 (1994), *reprinted in* 1994 U.S.C.C.A.N. 2807, 2877.

Following the passage of 20 U.S.C. § 7709, the Department enacted new regulations to replace the 1976 regulations. The new disparity calculation regulation closely mirrors the language of the statute:

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State.

34 C.F.R. § 222.162(a). But the regulation goes on to state, in a fashion similar to its predecessors, that "the method for calculating the percentage disparity in a State is in the appendix to this subpart." *Id.* The appendix, 34 C.F.R. pt.

222, subpt. K, app., contains the same per-pupil expenditure percentile ranking method as was outlined in the earlier appendices, and details the same specific methodology for calculating the twenty-five percent disparity test. It directs as follows:

> (a) The determinations of disparity in current expenditures or revenue per pupil are made by --
> (i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding year before the year of determination;
> (ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles *of the total number of pupils in attendance in the schools of those LEAs*; and
> (iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Id. (emphasis added). The history accompanying the regulation notes that the regulation outlines the single statutory standard for determining whether a state is equalized and "specifies the method the Secretary will employ to measure the statutory disparity standard. Detailed examples of the application of this method to State funding programs are provided in the Appendix following subpart K." 60 Fed. Reg. 50774, 50777 (September 29, 1995).[6] In sum, the

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[6] In 1996, after the Department's promulgation of the Impact Aid regulations, Congress revisited the Impact Aid laws "to make clarifying and technical amendments with respect to the Impact Aid program and to address problems related to Impact Aid payments which have national application." H.R. NO. 104-560, at 1 (1996), *reprinted in* 1996 U.S.C.C.A.N. 2894, 2894. None of the concerns

Department has adhered since 1976 to a rule which dictates that when disregarding LEAs to determine whether a state is equalized, the ninety-fifth and fifth percentiles should be calculated by the total number of students in the state, rather than by the number of LEAs.

With this history in place, we turn to an examination of the Department's percentile calculation to determine whether the Department's construction is permissible in light of the language in 20 U.S.C. § 7709 which directs that "local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," should be disregarded. 20 U.S.C. § 7709(b)(2)(B)(I).

In determining whether New Mexico qualified in the year in question here as an equalized state under 20 U.S.C. § 7709, the Department followed the methodology provided in the appendix to 34 C.F.R. § 222.162 to decide which LEAs fell within the ninety-fifth and fifth percentiles of "the total number of pupils in attendance in the schools of those LEAs." 34 C.F.R. pt 222, subpt. K, app. Applying this methodology to New Mexico, which has predominately small LEAs among its eighty-nine public LEAs, the Department eliminated the eighteen highest-ranked and the seven lowest-ranked LEAs before ascertaining that the newly-top-ranked LEA received only 14.43% more state funding than the newly-bottom-ranked LEA. The Department thus concluded that New Mexico's public school funding is substantially equalized.

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raised or amendments made in the 1996 changes to the Impact Aid law addressed in any manner the disparity test outlined in 20 U.S.C. § 7709 or the regulations promulgated to support it.

Zuni argues that this methodology directly conflicts with the statutory language of 20 U.S.C. § 7709(b)(2)(B)(i), which it reads to require the Department to eliminate LEAs on the basis of LEA percentiles rather than by student population percentiles. It asserts that the statute requires one of only two methods for determining the ninety-fifth and fifth percentiles of per-pupil expenditures: (1) eliminate five percent of the LEAs at the top and bottom of the ranked chart of LEAs, or (2) figure five percent of the highest and lowest actual per-pupil expenditure figures and disregard those LEAs that are funded above and below those numbers, respectively.[7] Zuni asserts the total number of students is irrelevant to determining percentiles of per-pupil expenditures and thus conflicts with the statute. We disagree.

Where a law entrusted to an agency's administration is ambiguous, or where Congress implicitly or explicitly left a gap in the law to be filled in by the agency through the formulation of policy or rules, "we must accept the agency's position so long as it reflects a permissible construction of the language in question." *Hill v. Ibarra*, 954 F.2d 1516, 1523 (10th Cir. 1992) (quotation omitted). *See also Chevron*, 467 U.S. at 842-43. "Such an interpretation is given controlling weight unless it is arbitrary, capricious, or contrary to law." *McNamar v. Apfel*, 172 F.3d 764, 766 (10th Cir. 1999).

When Congress passed 20 U.S.C. § 7709 in 1994, it codified the disparity standard essentially as it appeared in the

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[7] Under Zuni's first proffered method, Zuni eliminated the top five and bottom five LEAs and then calculated the disparity between the newly top and bottom ranked LEAs at 26.93%. *See* Aplt. br. at 12, n.1. Under its second method, Zuni calculated the disparity between the highest and lowest ranked LEAs at 117.4%. *Id.* at 13, n.2.

former regulations, albeit with an unexplained and slight alteration to the wording regarding percentile exclusions. *Compare* 34 C.F.R. § 222.63 (1993) *and* 34 C.F.R. pt. 222, subpt. K, app. (1993) *with* 20 U.S.C. § 7709(b). While the prior statutory scheme and regulations made clear that the percentiles were to be calculated by total student population, the new statutory language is not as explicit: the precise language directs the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile of *such [per pupil] expenditures in the State*". 20 U.S.C. § 7709(b)(2)(B)(i) (emphasis added). We agree with the Secretary's determination that the statute is ambiguous:

> [a]lthough the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulation, which has been duly promulgated at an appendix to subpart K of 34 CFR Part 222.

Rec., vol. III, doc. 25 at 3. In other words, we do not know what calculations Congress intended by "such [per pupil] expenditures in the State." Even Zuni conceded in its argument before the ALJ that the statute "may be ambiguous [as] to the precise formula that is to be used." *Id.*, doc. 16 at 10. The statute's ambiguity,[8] coupled with the gap left by Congress regarding the specific means by which to implement the disparity test, requires us, in accordance with the well-

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[8] This ambiguity is highlighted by Zuni's own proffer of two different approaches for making the disparity calculation, which result in different outcomes. *See infra* note 6.

established rule laid out in *Chevron*, to give deference to the Secretary's interpretation of the statute if we deem that interpretation to be reasonable or "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843. Based on our review of the statute, the regulations and the history accompanying both, we cannot hold that the Department's construction of the statute and the method by which it applied the disparity test was impermissible.

The statute mandates that the expenditures or revenue for each LEA be calculated on a per pupil basis. *See* 20 U.S.C. § 7709(b)(2)(B)(i). The statute then directs that those LEAs which fall above the ninety-fifth percentile or below the fifth percentile of "such [per-pupil] expenditures or revenues in the state" should be disregarded for the purpose of calculating the disparity standard. *Id.* Because the statute mandates that expenditures or revenues be examined on a per-pupil basis, we conclude the Department's method of determining the ninety-fifth and fifth percentiles based on the total student enrollment in the state is a permissible construction. Having already ranked the LEAs in descending order by their per-pupil expenditures, it makes sense that the cut-off points for percentiles would also be based on total student enrollment. Such an approach supports the basic purpose of the percentile exclusion because it eliminates in a fair and effective manner any unusual or noncharacteristic per-pupil revenues or expenditures that may appear at the extremes of the range of LEAs in the state. This is especially true for the State of New Mexico, which has predominately small LEAs, several of which rank near the top of per-pupil expenditures. *See* Rec., vol. I, doc. 4, attach. 4 at 1. To base the percentile calculation on LEAs, rather than student population, would not further the goal of eliminating this unusual distribution of per-pupil expenditures in New Mexico. As we previously

pointed out, the Department rejected determining percentiles solely on an LEA basis for this very reason.

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. 26324 (June 25, 1976). Finally, as detailed above, the Department's method of calculating percentiles by student population comports with the longstanding history surrounding such calculations.

There may exist some other, and perhaps even better, way to eliminate anomalies in school district funding in New Mexico. However, given the large number of small LEAs in the state, the Department's disparity calculation methodology implements the statute in a manner that will give a more consistent result when applied to a variety of state school systems. We need not conclude the "agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading [we] would have reached if the question initially had risen in a judicial proceeding." *Chevron*, 467 U.S. at 843 n.11. Rather, we are compelled to "sustain the agency's determination if it is based on a permissible construction of the statute." *Yellow Transp., Inc.*,

537 U.S. at 45 (quotation omitted). Based on our analysis above, we hold that the Department's construction of 20 U.S.C. § 7709(b)(2)(B)(i), through its application of the disparity calculation methodology laid out in 34 C.F.R. § 222.162(a) and its accompanying appendix, is permissible, and therefore warrants our deference under *Chevron*.

III

We turn next to Gallup-McKinley's argument challenging New Mexico's offset of contributions to LEAs. We decline to devote any substantial analysis to the merits of Gallup-McKinley's contention because we conclude it failed to raise this issue in a sufficient manner before the agency below.

Congress limits state offsets for federal Impact Aid funding to a "proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues." 20 U.S.C. § 7709(d)(1)(B). The corresponding regulation provides, in part, that "determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State." 34 C.F.R. § 222.163(a). On appeal, Gallup-McKinley complains that, in violation of the regulatory language requiring the state to determine proportionality on a "case-by-case" basis, New Mexico applies an across-the-board standard to its school districts. Gallup-McKinley contends it raised this specific issue during oral arguments before the ALJ.

In the course of the proceedings below, Gallup-McKinley outlined three different methods by which it believed the proportional Impact Aid offset should be calculated. One of these methods was admittedly presented to the ALJ for the first time during oral arguments. Rec., vol. III, doc. 16 at 86-

87. In that argument, Gallup-McKinley asserted a method of determining proportionality that conflicted with New Mexico's method. It was only at the very close of oral argument that Gallup-McKinley made the most general of references to the regulation's "case-by-case" language. *Id.* at 111-12. But Gallup-McKinley did not present any argument to the ALJ, either during the course of oral argument or in any of its initial written submissions to the judge, to explain why the State of New Mexico's proportionality calculation allegedly violated the "case-by-case" language appearing in 34 C.F.R. § 222.163(a) while its suggested method did not. The ALJ asked the parties to include in their supplemental briefs a discussion of whether Gallup-McKinley's additional method fell within the regulations. *Id.* at 102.

In their supplemental briefs to the ALJ, the State of New Mexico and Department of Education appropriately focused their arguments on whether Gallup-McKinley's newly proffered proportionality offset method fit within the regulations. Gallup-McKinley did the same, claiming in conclusory fashion and without any substantial discussion, argument, or analysis, that the regulation's "case-by-case" language was violated by New Mexico's method. It never offered any explanation as to why its suggested proportionality formula met the "case-by-case" requirement while New Mexico's did not, *id.*, doc. 17 at 4, and it still offers no such explanation in its appeal brief to us.

In its opinion, the ALJ considered Gallup-McKinley's three different interpretations of how 20 U.S.C. § 7709(d)(1) should be applied in light of the general proportionality issues timely and sufficiently presented to it, and rejected each as inconsistent with the statute and its corresponding regulation. *Id.*, doc. 21 at 8-10. It did not mention the "case-by-case" language of the regulation. In seeking review of the ALJ's

decision to the Secretary of Education, Gallup-McKinley reframed its challenge against the State of New Mexico's proportionality offset determination, and stated the "sole issue" on appeal was "whether determinations of proportionality must be made on a case-by-case basis for each LEA or if it can be based upon a general rule applied throughout the State." *Id.*, doc. 23 at 2. In addressing Gallup-McKinley's appeal, the Secretary limited its analysis to the more general proportionality issues that were presented to the ALJ, and did not devote any discussion to Gallup-McKinley's new and undeveloped "case-by-case" argument. *Id.*, doc. 25 at 2 n.3.

It is well established that "in the absence of exceptional circumstances, a reviewing court will refuse to consider contentions not presented before the administrative proceeding at the appropriate time." *Micheli v. Director, OWCP*, 846 F.2d 632, 635 (10th Cir. 1988) (quoting *Duncanson-Harrelson Co. v. Director, OWCP*, 644 F.2d 827, 832 (9th Cir. 1981) (further quotation omitted)). Likewise,

> [v]ague, arguable references to [a] point in the [lower] court proceedings do not . . . preserve the issue on appeal. [W]here a litigant changes to a new theory on appeal that falls under the same general category as an argument present at trial or presents a theory that was discussed in a vague and ambiguous way the theory will not be considered on appeal.

Bancamerica Commercial Corp. v. Mosher Steel of Kansas, Inc., 100 F.3d 792, 798-99 (10th Cir. 1996) (citations and quotations omitted). Hence, when a litigant fails to raise an issue below in a timely and clear fashion and the lower court does not address the merits of the issue, the issue is not

preserved for our review. *FDIC v. Noel*, 177 F.3d 911, 915 (10th Cir. 1999).

Based on our review of the record, Gallup-McKinley's passing and conclusory references to 34 C.F.R. § 222.163(a)'s "case-by-case" language during oral argument and in its supplemental briefs to the ALJ are, at best, ambiguous and vague. As a result, neither the ALJ nor the Secretary addressed the merits of this potential argument. We therefore conclude that Gallup-McKinley failed to preserve this issue for appeal, and we decline to address it.

The petition for review is **DENIED**.

O'BRIEN, dissenting.

The federal government makes payments for the benefit of local education agencies (LEAs) to ameliorate costs incurred in educating federally connected children. Such children include those residing on Indian lands. 20 U.S.C. § 7703(a)(1)(C). Quite reasonably, Congress wants the impact aid payments to be applied for the intended (and expressed) purpose, not merely used as a federal supplement for a state's general education needs. But the matter is complicated because some states have equalized education spending, taking money from wealthy LEAs to meet the needs of children in less fortunate ones. In truly equalized states the special costs of educating federally connected children are borne system-wide, rather than by the LEAs where those children reside. Congress recognized the complication and dealt with it quite specifically in the statutes. That is the backdrop for and focus of this litigation.

Plaintiff school districts contend that New Mexico has not equalized education spending and therefore cannot count

impact aid for LEAs as a local resource.[9] They are correct. Because the majority's decision defies express statutory language, I respectfully dissent.

The relevant statute, 20 U.S.C. § 7709, prohibits a state from counting federal Impact Aid payments as a resource in determining the amount of state aid to be allocated to that LEA for free public education.[10] But there is an exception for a state with "a program . . . that equalizes expenditures for free public education among local educational agencies in the State." 20 U.S.C. § 7709(b)(1). A state's educational spending is equalized--

> if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the *local educational agency* in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil

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[9] When impact aid is counted as part of an LEA's local resources it reduces the amount of state aid to the LEA.

[10] 20 U.S.C. § 7709(a) General prohibition Except as provided in subsection (b) of this section, a State may not--

(1) consider payments under this subchapter in determining for any fiscal year--

(A) the eligibility of a local educational agency for State aid for free public education; or

(B) the amount of such aid; or

(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

> expenditures made by, or per-pupil revenues available to, the *local educational agency* in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. § 7709(b)(2)(A) (emphasis added). In making that determination Congress directed the Secretary to "disregard *local educational agencies* [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State" as part of its equalization determination. 20 U.S.C. § 7709(b)(2)(B)(i) (emphasis added); *see also* 20 U.S.C. §§ 7702, 7703 and 7709(b)(1).

These requirements are unambiguous. A percentile is a mathematical concept not admitting of multiple interpretations; it is a simple, straightforward method of ranking an array of values. Attached to this dissent is Exhibit A. It lists all of the 89 New Mexico LEAs along with the per-pupil revenue for each.[11] Analysis of that array yields a value of $3,650.40 for the 95th percentile and $2,803.80 for the 5th percentile. Five districts are above the 95th percentile and five districts fall below the 5th percentile; they are excluded from further analysis. After the exclusion, Gadsden district has the lowest per-pupil revenues ($2,829.00). When those revenues are multiplied by 125% the result is $3,536.00, an amount less than the highest non-excluded district, Maxwell--

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[11] It uses the 1999-2000 data supplied by the parties and was produced using Microsoft's "Excel" spreadsheet program. Once the districts and per-pupil spending were listed the program's percentile function (=PERCENTILE ([first cell-Moscero district]:[last cell-Des Moines district],0.95) was applied to the array and returned the numbers for the 95th percentile and 5th percentile. No manipulation or massaging of the data was necessary.

with per-pupil revenues of $3,591.00. The 25% test is not met. New Mexico has not equalized school funding as statutorily required, therefore federal impact aid cannot be counted as part of the LEAs' resources.

Eschewing a plain and simple reading of the statute, the Department of Education has adopted regulations which it and, derivatively, the State of New Mexico used to determine whether New Mexico has an equalized educational funding system. The regulations essentially contradict and undermine the provisions of the statute that authorizes them, 20 U.S.C. § 7709.[12]

Rather than abide the statutory command to apply a mathematical function to an array of numbers, the Department adopted regulations directing a complex and mystifying formula for determining which LEA's fall into the 5th and 95th percentiles of per-pupil expenditures. 34 C.F.R. 222.162, *et. seq*. The regulations start correctly by requiring LEAs to be arrayed according to their per-pupil expenditures (or revenues). Next, and inexplicably, they require a calculation of 5 percent of the total number of pupils in the state. The number of LEAs necessary to use up 5% of the *state's student population* at both ends of the list are eliminated from consideration in applying the 25% formula. Then the per-pupil expenditures of the highest and lowest

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[12] The Department ignored 1994 statutory changes, clinging instead to contrary past practices. See Majority Op. at 11-13. It now argues, and the majority accepts, that its historical practice of using "pupils in attendance in the schools of those agencies" is congruent with the statutory language "per-pupil expenditures or revenues." As Justice Scalia said in a different context, "they are as similar as chalk and cheese." *Blakely v. Washington*, 159 L. Ed. 2d 403, 124 S. Ct. 2531, 2537 (2004).

remaining LEAs are used to determine whether there is less than a 25% disparity in funding and, therefore, "equalization." That seems quite at odds with the statute's directive to disregard LEAs "with per-pupil *expenditures or revenues* above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." I cannot join the majority in putting the Court's imprimatur on an unwieldy scheme utterly at odds with clear statutory language.

Review of this regulatory framework begins and ends with *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984). In reviewing an agency's construction of a statute it administers, we must first ask whether Congress has directly spoken on the precise question at issue. If the statute is silent or ambiguous, the inquiry is whether the agency's interpretation is a permissible construction of the statute. *Id.* at 842-43. However, when the statute is clear and unambiguous, further "interpretation" is not only unnecessary, it is prohibited. *Id.; see also Regions Hosp. v. Shalala*, 522 U.S. 448, 457, 139 L. Ed. 2d 895, 118 S. Ct. 909 (1998). Unlike the majority, I am not convinced we need to look beyond the statute to find the precise formula for measuring equalization.

Statutes should be read to avoid rather than beget ambiguity. Here, § 7709 instructs the Secretary to "disregard LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." The focus is upon LEAs, not upon the number of pupils. Moreover, Congress was concerned with ranking LEAs by expenditure (or resource) "percentiles," rather than by the number or percentage of students. The words Congress chose are not coincidental, nor are we

allowed to indulge in presumptions, despite our own personal predilections. *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, 117 L. Ed. 2d 391, 112 S. Ct. 1146 (1992) ("[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there.") (citations omitted).[13]

The Department's approach not only undermines the plain language of the statue, but also its purpose. "There is . . . no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes." *United States v. Am. Trucking Ass'ns*, 310 U.S. 534, 543, 84 L. Ed. 1345, 60 S. Ct. 1059 (1940). The stated purpose in providing Impact Aid is to "fulfill the Federal responsibility to assist with the provision of educational services to federally connected children in a manner that *promotes control by local educational agencies with little or no Federal or State involvement*." 20 U.S.C. § 7701 (emphasis added). Focusing on the needs of individual LEAs rather than on the entire state school population also flows into the understanding of § 7709, for its focus is on examining "the amount of per-pupil expenditures made by, or per-pupil revenues available to, *the local educational agency* in the State . . . ." 20 U.S.C. § 7709(b)(2)(A) (emphasis added).

In support of its conclusion that the statute is ambiguous, the majority emphasizes 1994 events saying that Congress codified the disparity standard in 20 U.S.C. § 7709 "essentially as it appeared in the former regulations," which

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[13] The subsection's title "Computation," 20 U.S.C. § 7709(b)(2), suggests that Congress had a particular formula in mind, the one it adopted.

allowed for the percentile calculation to be based on the total student enrollment in the state. Majority Op. at 15. The statement might be persuasive if it were not manifestly untrue. The entire basis for this case is the difference in language between the 1994 statute, which by its terms does not allow for a population based calculation, and the pre-existing regulations that expressly did. If Congress had adopted a standard that was "essentially" the same as the pre-existing regulations, it would not have altered the language of the statute to require that the calculation be based on per-pupil expenditures or revenues of "local educational agencies." While the majority may consider such a difference an "unexplained and slight alteration," such a conclusion ignores the strong presumption that Congress chooses its words carefully and with full knowledge of administrative interpretations. "Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute *without change*." *Lorillard v. Pons*, 434 U.S. 575, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978) (emphasis added).[14] The fact that Congress adopted a disparity standard different from the clearly articulated pre-existing regulations is evidence that Congress rejected, rather than adopted, the total student enrollment standard.

The majority observes, "There may exist some other, and perhaps even better, way to eliminate anomalies in school district funding in New Mexico." Maj. Op. at 18.

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[14] "This selectivity that Congress exhibited in incorporating provisions and in modifying certain FLSA practices strongly suggests that *but for those changes Congress expressly made*, it intended to incorporate fully the remedies and procedures of the FLSA". *Id.* at 582 (emphasis added).

Nevertheless it concludes the Department's construction is a permissible one. I posit that the Department's method of handling the 5th/95th percentile exclusion may be the superior one, but it is not the one ordained by Congress.

EXHIBIT A
JUDGE O'BRIEN'S DISSENT

Impact Aid Disparity for 1999-2000

District	Revenue/ Member
1 Mosquero	$6,520.00
2 Corona	$5,791.00
3 Los Alamos	$5,611.00
4 Vaughn	$4,641.00
5 Hondo Valley	$3,690.00
1st district ABOVE 95th Percentile	
$3,650.40 = 95th Percentile	
6 Maxwell	$3,591.00
7 Mora	$3,530.00
8 Roy	$3,516.00
9 Logan	$3,484.00
10 Cuba	$3,404.00
11 Silver City	$3,391.00
12 Texico	$3,335.00
13 Zuni	$3,320.00
14 Springer	$3,295.00
15 Jemez Valley	$3,286.00
16 Ruidoso	$3,278.00
17 Tatum	$3,266.00
18 Penasco	$3,259.00
19 Raton	$3,249.00
20 Tularosa	$3,246.00
21 Bernalillo	$3,244.00
22 Las Vegas West	$3,241.00
23 Mesa Vista	$3,233.00
24 Hatch	$3,206.00
25 Loving	$3,204.00
26 Mountainair	$3,195.00
27 Cobre	$3,194.00

District	Revenue/ Member
28 Melrose	$3,187.00
29 Taos	$3,164.00
30 Pojoaque	$3,155.00
31 Wagon Mound	$3,154.00
32 Carlsbad	$3,152.00
33 Clayton	$3,151.00
34 Espanola	$3,147.00
35 Jemez Mountain	$3,123.00
36 Las Vegas City	$3,122.00
37 Ft. Sumner	$3,100.00
38 Magdalena	$3,092.00
39 Jal	$3,091.00
40 Cimarr n	$3,088.00
41 Reserve	$3,087.00
42 Lordsburg	$3,074.00
43 Albuquerque	$3,071.00
44 Chama	$3,065.00
45 San Jon	$3,059.00
46 Questa	$3,054.00
47 Santa Fe	$3,050.00
48 Grants	$3,035.00
49 Pecos	$3,033.00
50 Central	$3,027.00
51 Santa Rosa	$3,011.00
52 Elida	$3,006.00
53 Estancia	$3,002.00
54 Dora	$2,996.00
55 Roswell	$2,992.00
56 Clovis	$2,983.00
57 Alamogordo	$2,982.00
58 Tucumcari	$2,975.00
59 Animas	$2,975.00
60 Portales	$2,975.00

District	Revenue/ Member
61 Las Cruces	$2,974.00
62 Socorro	$2,968.00
63 Bloomfield	$2,968.00
64 Artesia	$2,964.00
65 Lovington	$2,963.00
66 Capitan	$2,962.00
67 Rio Rancho	$2,959.00
68 Belen	$2,948.00
69 Farmington	$2,948.00
70 Truth or Cons.	$2,945.00
71 Aztec	$2,942.00
72 House	$2,936.00
73 Grady	$2,915.00
74 Deming	$2,912.00
75 Los Lunas	$2,887.00
76 Cloudcroft	$2,884.00
77 Dexter	$2,883.00
78 Carrizozo	$2,880.00
79 Moriarty	$2,870.00
80 Gallup	$2,861.00
81 Quemado	$2,858.00
82 Eunice	$2,849.00
83 Hobbs	$2,848.00
84 Gadsden	$2,829.99
$2,803.80 = 5th Percentile	
1st district below 5th Percentile	
85 Lake Arturn	$2,787.00
86 Dulce	$2,783.00
87 Hagerman	$2,777.00
88 Floyd	$2,725.00
89 Des Moines	$2,672.00

District	Revenue/ Member
Total	$284,095.00
Mean	$3,192.08
Median	$3,059.00
95th Percentile	$3,650.40
5th Percentile	$2,803.80

APPENDIX C

THE SECRETARY OF EDUCATION
WASHINGTON, DC 20202

Docket No. 99-81-I

[Filed October 11, 2001]

In the Matter of	)
ZUNI PUBLIC SCHOOL	)
DISTRICT #89 and	)
GALLUP-McKINLEY	)
PUBLIC SCHOOLS,	)
	)
Applicants.	)
	)

Impact Aid Proceeding

DECISION OF THE SECRETARY[15]

Zuni Public School District #89 (Applicant) is a local education agency (LEA) in the State of New Mexico seeking review of the April 17, 2001 Initial Decision of Chief Administrative Law Judge Allan C. Lewis (ALJ). The ALJ dismissed Applicant's challenge to a determination by the Assistant Secretary for Elementary and Secondary Education

[15] This decision serves as contemporaneous notice that the petitions requesting review of the Initial Decision have been granted.

(Assistant Secretary) regarding the Assistant Secretary's certification of the State's request, for the purpose of participation in the Federal Impact Aid Program, to calculate its expenditure of public education funds for fiscal year 1999 under an equalization standard pursuant to the Impact Aid Act, Pub. L. No. 81-874, 64 Stat. 1100 (20 U.S.C. §§ 236-244).[16]

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[16] The Impact Aid Act was repealed; see the Improving America's Schools Act of 1994, § 331 (b), Pub.L. No. 103-382, 108 Stat. 3518, 3965, and a new Impact Aid statute enacted, Title VIII, § 8001, 108 Stat. at 3749, codified at 20 U.S.C. §§ 7701-7714 (1994). As a consequence of those legislative judgments, the impact aid program is now governed by Title VIII of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's School's Act of 1994.

The ALJ dismissed Applicant's[17] challenge after concluding that the outcome of the Assistant Secretary's determination was correct. For the reasons noted below, I affirm the ALJ's decision, and uphold the Assistant Secretary's certification for the State of New Mexico for fiscal 1999. Inasmuch as the ALJ's decision is unclear or ambiguous on an important question raised by the parties, this decision modifies – to the extent necessary – and clarifies the ALJ's decision as to why the impact aid regulations at issue control the outcome of this case, and are not in conflict with the impact aid statute.

The impact aid statute requires that a state participating in the federal impact aid program that calculates the state's share of expenditures for participation in the impact aid program by including federal impact aid funds m the state's share of expenditures for public education have in effect a program of

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[17] Gallup-McKinley Public Schools, an LEA, appeared before the ALJ raising its own challenges to the Assistant Secretary's determination on the basis of policy arguments; ostensibly arguing that New Mexico is using the equalization exception to transfer the State's own responsibility for funding public education to the federal government by way of the impact aid program. In support of its position, the LEA offers a number of alternative calculations to determine the proportional share of local tax revenues covered under the equalization program. The ALJ dismissed those challenges because they were inconsistent with the clear statutory mandate on proportionality. As the ALJ pointed out, it is apparent that the LEA is frustrated with the State's funding of public education over the previous two decades, but the LEA seeks a remedy that is far outside the scope of the limited and narrow purposes of impact aid funding. Upon my review, the ALJ's findings and determinations with regard to Gallup-McKinley Public Schools challenges are upheld.

aid that equalizes expenditures for free public education among its local educational agencies.[18] The ALJ agreed with the Assistant Secretary that New Mexico met the equalization standard for fiscal 1999. Applicant contends that the Assistant Secretary erred in concluding that the state met the equalization standard by using what is termed a "disparity test"[19] that is inconsistent with the impact aid statute. Although the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR Part 222.

In support of its petition, Applicant makes it clear that it does not seek to have the Initial Decision "overturn[ed]."

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[18] Under the Federal impact aid program, a school system or district may be eligible for Federal assistance due to the presence of the Federal government in the school district.

[19] The disparity test is a means to determine whether a State equalizes public school expenditures among its LEAs. Equalization is present–

> if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than twenty-five percent (25%).

20 U.S.C. § 7709(b)(2)(A).

Instead, applicant seeks review of a question the ALJ did not resolve; namely, a definitive statement that the Department's impact aid regulations contained in an appendix to Subpart K of 34 CFR Part 222 are "invalid."[20] Notably, Applicant points out that the record is replete with indications the reason the ALJ did void the regulations at issue was due to the ALJ's determination that he did not have authority to do so.

Notwithstanding Applicant's argument, it is clear that the ALJ applied the appropriate regulations to the issues at hand, and ultimately determined, correctly, that New Mexico's program Complied with the statutory requirements. The Department's regulations at the appendix of Subpart K of 34 CFR Part 222 were promulgated in the exercise of the Department's rule-making authority by implementing a specific statutory provision with regulations that clarify the general rights end obligations, beyond a specific case, of states that seek federal impact aid funds using the congressionally mandated equalization formula.

The impact aid statute requires that in determining whether a state's funding is equalized, the Department direct states to calculate their disparity percentage by disregarding per-pupil public education funding for LEAs whose funding is above the 95th percentile or below the 5th percentile of public education revenues in the state.[21] The Department

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[20] Although Applicant States that it does not seek a reversal of the ALJ's decision, Applicant ostensibly seeks the same outcome as a reversal by requesting that I "decertify New Mexico as an equalized state." Apparently, in Applicant's view, this outcome is warranted as a result of a conclusion that the Department's impact aid regulations are in conflict with the governing statute.

[21] See 20 U.S.C. § 7709(b)(2(B)(i) and 34 C.F.R. § 222.162(a).

implemented this statutory obligation by promulgating the regulations at the appendix of Subpart K of 34 CFR Part 222, wherein it requires states to compute the state's disparity percentage by ranking the state's LEAs and disregard those LEAs in the ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs. There is nothing within the text of the statute that precludes this interpretation or *requires* another result.

The appendix regulations simply assist states in determining how to decide the percentile cut-off points designated by the statute, but not defined by the statute. The fact that Applicant disagrees that the percentile cut-off points should not be positioned precisely at the per-pupil level does not render the Department's interpretation of the statute "invalid" or unreasonable.[22] As such, the regulatory appendix is binding "unless procedurally defective.[23] In this regard, the Applicant does not dispute that the regulations at issue were promulgated in accordance with the Department's rule-making authority and in compliance with the Administrative Procedure Act's requirements of notice and comment.

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[22] According to Applicant, there are two additional interpretations of the statute, either of which would satisfy Applicant; namely, to direct states to calculate the disparity percentage by disregarding the top and bottom 5% of the ranked LEAs or "multiply the per-pupil figures for the highest LEA by 95% and per-pupil figures for the lowest LEA by 105%" and disregard LEAs above and below the respective lines Since these methods were presented to the ALJ and flatly rejected by the ALJ's judgment, I need not revisit reasons why Applicant's proposed calculations are not pertinent to whether the Department's regulatory appendix contains a reasonable implementation of the statute's disparity test.

[23] *U.S. v. Mead*, No. 99-1434, _U.S. _(June 18, 2001).

The considerable weight usually accorded the Department's interpretation of the statute that it is entrusted to administer should apply to the regulations at the appendix of Subpart K of 34 CFR Part 222;[24] those regulations are consistant with the statutory provision they implement. Accordingly, consistent with this modification of the Initial Decision of Chief Administrative Law Judge Allan C. Lewis, the challenges by the Applicants are DISMISSED, and the determination by the Assistant Secretary for Elementary and Secondary Education is affirmed.

So ordered this 11 day of October 2001.

/s/
Rod Paige

Washington, D.C.

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[24] The Supreme Court recently spoke directly to this issue by explaining that it should be "apparent from the agency's generally conferred authority and other statutory circumstances that congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one about which 'Congress did not actually have an intent' as to a particular result." *Id.* at 9.

APPENDIX D

UNITED STATES DEPARTMENT OF EDUCATION

OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

NOTICE OF CERTIFICATION UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (20 U.S.C. § 7709 (b))

State- New Mexico

Period of Certification - July 1, 1999 - June 30, 2000

As further described in the enclosed report, we have determined that New Mexico is eligible to take into consideration Impact Aid payments in determining State aid to local educational agencies in accordance with section 8009 (b) of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's Schools Act of 1994 (20 U.S.C. § 7709 (b)) for the period noted above.

Any local educational agency adversely affected by this action may request, in writing and within 30 days of the receipt of this notice, a hearing under section 8009 (c) (3) (B) and 34 C.F.R. § 222.165. A request for a hearing should be sent to: Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244.

Enclosure

/s/
Catherine Schagh, Director
Impact Aid Program

U. S. Department of Education
Office of Hearings & Appeals

Docket No. 99-81-I

[Filed April 17, 2001]

IN THE MATTER OF	)
ZUNI PUBLIC SCHOOL	)
DISTRICT #89 and	)
GALLUP-MCKINLEY	)
PUBLIC SCHOOLS INITIAL	)
	)

Impact Aid Proceeding

Before: Chief Administrative Law Judge

This is a proceeding initiated by two local educational agencies, the Zuni Public School District #89 (Zuni) and the Gallup-McKinley Public Schools (Gallup), to contest a determination and certification by the Assistant Secretary for Elementary and Secondary Education (Assistant Secretary) that, for the fiscal year 1999-2000, the State of New Mexico had in effect a program of aid that equalizes expenditures for free public education among its local educational agencies in compliance with 20 U.S.C. § 7709(b) (1994). Due to its interest in this matter, the State of New Mexico (New Mexico) was allowed to participate as an intervenor.

Based upon the submissions of the parties, the record, and for the reasons stated, *infra*, it is concluded that the determination is correct and, accordingly, the appeals by Zuni and Gallup are dismissed with prejudice.

I. OPINION

There is a general prohibition that a State may not consider Federal impact aid payments to a local educational agency (LEA) in determining the amount of the State's contribution to the LEA for free public education. 20 U.S.C. § 7709(a) (1994). An exception to the general prohibition permits a State to consider Federal impact aid if a State "has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in such State." 20 U.S.C. § 7709(b)(1).

In 1994, Congress adopted the disparity test as the sole means to determine whether a State had a program of State aid that equalizes expenditures among its local educational agencies. Equalization is present -

> if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than twenty-five percent (25%).

20 U.S.C. § 7709(b)(2)(A).

In determining whether the disparity percentage is more than 25 percent, the Secretary shall "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C.

§ 7709(b)(2(B)(i); 34 C.F.R. § 222.162(a) (1999). Then, the disparity percentage is calculated, first, by determining the difference between the current expenditure or revenue per pupil of the LEA at the 95th percentile and the current expenditure or revenue per pupil of the LEA at the 5th percentile. This difference is then divided by current expenditure or revenue per pupil figure of the LEA at the 5th percentile and yields the disparity percentage.

The Appendix to Subpart K of 34 C.F.R. Part 222 mandates that the student population of the State, not the LEA population, be used to determine the per pupil expenditure or revenue at the 5th and 95th percentiles –

> [the determinations of disparity are made by ranking all LEAs and then] identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs.
>
> . . . .
>
> *Example*: In State X, after ranking all LEAs . . . in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditures that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820 and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000.

For the fiscal year 1999-2000, New Mexico had a range of revenue per membership (*i.e.* per student) between a low of $2,672 for students attending the LEA Des Moines and a

high of $6,520 for students attending the LEA Mosquero. Based upon the ranking of the State's membership, the 5th percentile of membership was $2,848 and fell within the membership of the LEA Hobbs. The 95th percentile of membership was $3,259 and fell within the membership at the LEA Penasco. These two percentiles of revenue per membership yielded a disparity percentage of 14.43% which was well under the 25% maximum limitation. Thus, the Assistant Secretary certified New Mexico's program as a program that equalizes expenditures for free public education under 20 U.S.C. § 7709(c)(3)((A).

Zuni challenges the certification of New Mexico on several grounds. Its main disagreement concerns the usage of the student membership population rather than the LEA population to determine the cutoff points at the 5th and 95th percentiles for purposes of the disparity test. In its view, 20 U.S.C. § 7709(b)(2)(B) mandates the usage of a State's population of LEAs to determine the cutoff points in clear and unambiguous terms –

> (B) . . . In making a determination under this subsection, the Secretary shall –
>
> (i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State . . . .

Hence, Zuni urges the tribunal to disregard the student membership approach adopted in the regulation and to follow

the statute in determining whether New Mexico has an equalized program.[25] This argument requires the tribunal to invalidate the Appendix to the regulation.[26]

The Assistant Secretary responds that 20 U.S.C § 7709(b)(2)(B)(i), as enacted in 1994, was an attempt to codify the disparity standard set forth in the regulations interpreting the former 20 U.S.C. § 240(d)(2) (1993) and that, for unknown reasons, the draftsmen "slightly altered" its language creating the present controversy over its construction. He argues that the current appendix of the regulation, which mandates cutoff points based upon the population of students, represents a reasonable interpretation of the provision. In his view, such an interpretation is fully consistent with the remainder of 20 U.S.C § 7709, its predecessor statute, and underlying regulations. It is also consistent with the standards used in statistics and the

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[25] Zuni advances several approaches in ranking the LEAs. Under all of its methods, New Mexico exceeds the maximum allowable disparity percentage and, therefore, its program was not in compliance with 20 U.S.C. § 7709(b)(2)(A).

[26] During the oral argument, the tribunal voiced a serious concern whether it could invalidate a regulation that conflicted with a statute. In a subsequent filing, Zuni reconfigured its argument. Now, it emphasizes the disharmony between the Appendix and 34 C.F.R. § 222.162(a), a regulation whose language is identical to 20 U.S.C. § 7709(b)(2)(B). This view requires the tribunal to resolve only a conflict within the regulations, something that Zuni urges the tribunal is empowered to do. While Zuni's argument is quite resourceful, it ignores the substance and reality of the present issue, namely whether the Appendix is consistent with its underlying statute. As explained below, this is a matter for a Federal court to resolve.

financial measurement of educational institutions. In his reply brief, the Assistant Secretary belatedly adds that the tribunal lacks the authority to overturn a Departmental regulation under *In re Smithville R-II School District*, Dkt. No. 91-4-I, U.S. Dept of Education (Sec. Dec. July 27, 1992).

In *Smithville*, the Secretary held that "[t]he Administrative Law Judge does not have authority to overturn a Department regulation, and as a matter of public policy the Secretary is extremely reluctant to overturn a regulation established through the formal rulemaking process." *Id.* at 1. The rational for this holding is set forth in *Lemont Township High School*, Dkt. No. 89-48-I, U.S. Dept of Education (ALJ Op. Feb. 6, 1992) (aff'm May 4, 1992). A tribunal must have either the inherent authority or a specific statutory authority to rule on such a question. Inherent authority lies with an Article III court such as a Federal district court. Tribunals with specific statutory authority include legislative courts such as the Article I, United States Tax Court or other boards such as the Benefits Review Board within the Department of Labor. *Lemont* concluded that a hearing authorized under 20 U.S.C. § 240(g) (1988) and conducted in accordance with the Administrative Procedure Act, 5 U.S.C. § 551 *et. seq.*, and 34 C.F.R. Part 218 (1988) had neither the inherent authority nor the specific statutory authority to rule on the validity of regulations. *Id.* at 5-6.

Zuni invites the tribunal to reconsider the *Lemont* decision as it pertains to the absence of specific statutory authority to rule on this type of an issue. In *Lemont* the tribunal stated that –

> Congress created several boards or other tribunals with specific authority to pass upon this question. For example, the Tax Court of the United States . . .

Similarly, the Benefits Review Board, a body within the Department of Labor, was created by Congress in 1972 and was given this specific authority according to the Sixth Circuit in *Gibas*, 748 F.2d 1112 (1984) . . .

In *Gibas*, the Sixth Circuit noted that the Board was created to fulfill the review function previously performed by the [federal] district courts regarding benefit requests under several federal workers' compensation programs. Congress expressly granted the Board the authority under 33 U.S.C. § 921 (b)(3) "to hear and determine appeals raising a substantial question of law or fact." The Board could not engage in *de novo* review of an administrative law judge's determination and could only set aside this determination if it was not supported by substantial evidence or not in accordance with the law. Decisions by the Board were appealable to the courts of appeal. In these circumstances, the Sixth Circuit concluded that –

> [I]n sum, the Board performs the identical appellate function previously performed by the district courts. Therefore, it appears that Congress intended to vest in the Board the same judicial power to rule on substantive legal questions as was possessed by the district courts. *See Carozza v. United States Steel Corp.*, 727 F.2d 74 (3d Cir. 1984).

Id. at 1118. It held, therefore, that the specific statutory authority conferred by Congress on the Board to decide appeals raising a "substantial question

> of law" included the authority to declare invalid regulations promulgated by the Secretary of Labor.
>
> In the case at bar, it is apparent that Congress did not specifically authorize the tribunal to pass on the validity of regulations issued by the Secretary of Education. . . [The hearing is conducted in accordance with the Administrative Procedure Act. The initial decision is] made subject to the published rules of the agency . . . [that includes] the regulations promulgated by the Secretary of Education. . . Hence, it is apparent that Congress did not specifically authorize the tribunal to pass upon the validity of regulations promulgated by the Secretary of Education. In fact, Congress required that the administrative law judge should follow the published rules of his or her agency.

Id. at 4-6.

Zuni advances several arguments urging that the tribunal may rule on the validity of a regulation. First, 20 U.S.C. § 7711(a) permits a broad scope of adjudication as it provides that "any action of the Secretary" may be reviewed and thus, it may include this issue. Second, unlike a typical chain of review that consists of the administrative law judge, a district court, and a court of appeals, the present process utilizes only an administrative law judge and a court of appeals. As such, Zuni asserts that the function of the district court must now be performed by the administrative law judge and, therefore, the tribunal may rule on the validity of a regulation.

In *Gibas*, the chain of review was an important factor because it showed that the Benefits Review Board replaced the Federal district court as the reviewing tribunal and that, coupled with a review authority similar to that possessed by

a Federal district court, led the court to conclude that the Benefits Review Board had the authority to pass on the validity of a regulation. Under 20 U.S.C. § 240(g) (1980), the predecessor of 20 U.S.C. § 7711, and 34 C.F.R. § 222.69 (1980), the chain of review began with the administrative law judge. His decision was subject to review by the Secretary of Education before the matter proceeded to a Federal district court. In 1994, Congress changed the process and eliminated the Federal district court. Thus, an appeal of an adverse decision by the Secretary of Education now goes directly to a Federal court of appeals. While the chain of review was modified, Congress carried over intact, in 20 U.S.C. § 7711(a), the language of 20 U.S.C. § 240 (g) that authorized a LEA or State to contest "any action of the Secretary" in an administrative hearing before an administrative law judge. Thus, neither the present appeal process nor the provision authorizing the administrative hearing suggest that Congress granted the administrative law judge the authority to invalidate a regulation.

Zuni also notes that 5 U.S.C. § 706 and case law in the Tenth Circuit require that, in order for an appellate court to consider a matter on review, the issue must have been raised below and a record made thereof. Accordingly, it urges that the tribunal must consider the validity issue. Zuni's point is true as a general matter. However, this rule is limited to a matter that the lesser tribunal has authority to address and resolve. Here, the first tribunal with authority to address the validity of a regulation is the Federal court of appeals. In sum, Zuni's arguments do not persuade the tribunal to request the Secretary to reconsider the *Smithville* decision.

Next, Zuni argues that several errors were made in computing LEA revenue per membership for purposes of the disparity test. In this calculation, 20 U.S.C. § 7709

(b)(2)(B)(ii) requires that the total expenditures or revenues of a LEA be adjusted to eliminate any additional expenditures or revenues incurred for the special needs of students or for the unusual needs of a LEA –

> (B) . . . [I]n making a determination . . . the Secretary shall . . .
>
> (ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

These additional costs or revenues, commonly called special cost differentials, are further defined by the Secretary as--

> (i) [t]hose [costs] associated with pupils having special education needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and
>
> (ii) [t]hose [costs] associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

34 C.F.R. § 222.162(c)(2).

New Mexico considered three categories of LEA revenue as special cost differentials and, therefore, excluded these revenues from each LEA's total revenue in computing the LEA's revenue per membership. Zuni disagrees with this treatment. Each category of revenue possesses, however, the

characteristics of a special cost differential. The "save harmless" category (N.M.S.A. 22-8-25(D)(3)) represents an adjustment for sparsity of population and economic adversity as it provides additional revenue for a small school district, *i.e.* one with less than a 200 membership or that experiences a decline in membership. A LEA experiencing abnormal growth (N.M.S.A. § 22-8-23.1) receives additional revenues to cope with the effect of a sudden increase in density of its student population. A small and rural school district (N.M.S.A. § 22-8-23) is entitled to additional revenue to offset the economic impact of its rural isolation. Accordingly, the revenue attributable to these three categories was properly excluded from the LEA's total revenue in computing its revenue per membership.

Lastly, New Mexico treated two LEA programs (the special education and bilingual programs) as special cost differentials. It, therefore, eliminated the revenue from these programs in the LEA's total revenue in computing the LEA's revenue per membership. The amount of the reduction was determined by multiplying the number of membership program units attributable to each program by the statewide program unit value, a dollar value set, in effect, by the legislature each year. The parties do not dispute the appropriateness of a revenue reduction only the amount thereof. The issue is whether, in determining the amount of the revenue reduction for each LEA, its teacher training and experience index should be taken into consideration. New Mexico argues that the index should not affect the amount of the revenue reduction because it was simply following prior instructions by the Department regarding the treatment of this item. The Assistant Secretary and New Mexico also argue that the exclusion of the index produces a revenue reduction directly related to these programs.

The resolution of this issue lies in understanding the function of the index within the State's funding formula Under the funding formula, a LEA determines the number of its membership program units. This is the sum of the product of the student membership in each of the four educational programs (early childhood, basic, special education, and bilingual) and the cost differential factor for each program. The total number of membership program units is multiplied by the LEA's teacher training and experience index and, for purposes relevant here, yields the LEA's number of program units. The LEA's revenue or program cost is then the product of its program units and the statewide program unit value.

The cost differential factors assigned to the four educational programs represent an effort by the legislature to establish a comparative cost basis among the programs. While a cost differential factor has a salary component, it does not reflect, as to each LEA, the particular salary level of its staff. This is accomplished under the funding formula through the teacher training and experience index, an index that varies between 1.0 and 1.227, and is assigned based on the academic training and teaching experience of the LEA's staff. N.M.S.A. § 22-8-24. Since the cost differential factor and the index are adjustments to reflect costs incurred in the various programs, each must be considered in order to determine the total revenue attributable to a particular program. As such, the proper approach to determine the revenue attributable to the special education or the bilingual program for a LEA is to multiply three items: the membership program units for the particular program (which includes an adjustment for its cost differential factor), its teacher training and experience index, and the statewide program unit value.

While New Mexico's computation of the disparity test is in error due to the exclusion of the teacher training and

experience index, its inclusion has minimal effect on the disparity test computation and does not change the result under the disparity test. Accordingly, New Mexico's program remains qualified under the disparity test.

Gallup maintains that New Mexico took too much of Gallup's Federal impact aid into consideration in determining the amount of the State's contribution to the LEA. As noted above, a State that has a qualified program may take into consideration payments of Federal impact aid in determining the financial need of its LEAs. The State may consider "as local resources [Federal impact aid] funds . . . only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues." Section 7709(d)(1)(B); 34 C.F.R. § 222.162(a). The proportion is obtained "by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA." 34 C.F.R. § 222.163(b).[27]

In its filings with the Department for the fiscal year 1999-2000, New Mexico considered as local revenue 75% of the LEA's Federal impact aid. New Mexico levied a statewide .5 mil property tax to raise funds for current expenditures for educational services. N.M.S.A. § 7-37-7.B(2). Of this

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[27] Local tax revenues covered under the equalization program are defined as local tax revenues levied for current expenditures for educational services that are taken into consideration in a State aid program. 34 C.F.R. § 222.161(c). Total local tax revenues are all local tax revenues levied for current expenditures for educational services but excludes revenues from State and Federal sources. 34 C.F.R. § 222.161(c).

amount, 75% was designated as local tax revenue under the States equalization program. N.M.S.A. § 22-8-25(B).

Gallup raises three alternative arguments in an effort to substantially reduce the amount of Federal impact aid that may be considered by New Mexico under its equalization program. It urges that, for the fiscal year 1999-2000, the offset for Federal impact aid funds be limited to –

1. The amount of local tax revenues generated by the .5 mil levy in fiscal year 1999-2000, e.g. approximately $245,774 in Gallup's case;

2. The proportion of statewide property tax revenues that existed in 1974-1975, the first year of the equalization program, *i.e.* that Federal impact aid may be considered as a local resource to the extent of 35% of the projected property tax revenues;[28] or

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[28] In 1974-1975, the percentage of total statewide property tax revenues and Federal impact aid revenues was 65% and 35%, respectively. Based upon projected property tax revenues of $7,208,379 for the fiscal year 1999-2000 and assuming these revenues represent 65% of the districts' contribution, then the corresponding amount of Federal impact aid revenue is $3,881,435. Since Gallup's share of the total statewide Federal impact aid revenue is 46% for fiscal year 1999-2000, it argues that the State may consider as local resources only 46% of the $3,881,435 or $1,785,460. Under this alternative, Gallup retains approximately $23 million of its Federal impact aid revenue.

3. The proportion that a LEA's local property taxes imposed to support its schools bears to the total local property taxes imposed to support all public schools within the State.[29]

At the heart of Gallup's arguments is its frustration with the actions of the State over the past two decades toward funding public education. It has significantly reduced the property tax as a source of revenue while continuing to rely heavily upon the Federal impact aid revenues received by Gallup and other LEAs.

Gallup's three alternative interpretations are not consistent with the statutory language of 20 U.S.C. § 8009(d)(1)(B). The first proposal limits the Federal impact aid to the amount of the local property tax imposed; however, 20 U.S.C. § 8009(d)(1)(B) requires a proportion of local taxes to determine the percentage of Federal impact aid that may be considered as a local resource. While the second alternative employs a proportional method, the proportion is based on the local taxes collected during 1974-1975, the first year of the equalization program. The statute requires a yearly computation of the proportion using tax revenue figures appropriate to that year.

Gallup's third alternative utilizes a proportional approach; however, neither the numerator nor the denominator conform to the statutory mandate. Gallup's numerator is the LEA's total local property tax revenue while

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[29] For example, in McKinley county where Gallup operates, the local tax assessment was $245,774 and the statewide total local tax assessment was $7,699,000. As such, McKinley's share was 3.19%. Accordingly, the amount of Federal impact that may be considered as local resources is the product of the amount of McKinley's Federal impact aid and 3.19%.

20 U.S.C. § 8009(d)(1)(B) limits the local tax revenue only to the revenue covered under the equalization program. Gallup's denominator reflects the local property tax revenue on a statewide basis rather than the total local tax revenue of an individual LEA as required by the statute–

> [the proportion is obtained] by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within *that* LEA.

34 C.F.R. 222.163(b) (emphasis added).

In summary, the Assistant Secretary's determination is upheld in all respects except for the treatment accorded the teacher training and experience index. This index must be considered as one factor in determining the amount of revenue attributable to the special education and bilingual programs. The Assistant Secretary properly certified New Mexico's program as complying with 20 U.S.C. § 7709(b).

II. ORDER

On the basis of the foregoing findings of fact and conclusions of law and the proceedings herein, it is HEREBY ORDERED that the appeals of Zuni and Gallup are dismissed with prejudice.

/s/
Allan C. Lewis
Chief Administrative Law Judge

Issued: April 17, 2001
Washington, D.C.

APPENDIX E

STATUTORY AND REGULATORY PROVISIONS INVOLVED

20 U.S.C. § 7709

§ 7709. State consideration of payments in providing State aid

(a) General prohibition

Except as provided in subsection (b) of this section, a State may not—

(1) consider payments under this subchapter or under the Act of September 30, 1950 [20 U.S.C.A. §§ 236 to 244] (Public Law 874, 81st Congress) (as such Act was in effect on the day preceding October 20, 1994) in determining for any fiscal year—

(A) the eligibility of a local educational agency for State aid for free public education; or

(B) the amount of such aid; or

(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

(b) State equalization plans

(1) In general

A State may reduce State aid to a local educational agency that receives a payment under section 7702 or 7703(b) of this title (except the amount calculated in excess of 1.0 under subparagraph (B) of section 7703(a)(2) of this title) or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] as such Act was in effect on the day preceding October 20, 1994 (other than an increase in payments described in paragraphs (2)(B), (2)(C), (2)(D), or (3)(B)(ii) of section 3(d) of such Act of September 30, 1950 [20 U.S.C.A. § 238(d)]) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that such State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in such State.

(2) Computation

(A) In general

For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in

the State with the lowest such expenditures or revenues by more than 25 percent.

(B) Other factors

In making a determination under this subsection, the Secretary shall—

(i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and

(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

(3) Exception

Notwithstanding paragraph (2), if the Secretary determines that the State has substantially revised its program of State aid, the Secretary may certify such program for any fiscal year only if—

(A) the Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in paragraph (2) for the fiscal year for which the determination is made; and

(B) the State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met such standard for the fiscal year for

which the determination is made, the State will pay to each affected local educational agency the amount by which the State reduced State aid to the local educational agency.

(c) Procedures for review of State equalization plans

(1) Written notice

(A) In general

Any State that wishes to consider payments described in subsection (b)(1) of this section in providing State aid to local educational agencies shall submit to the Secretary, not later than 120 days before the beginning of the State's fiscal year, a written notice of such State's intention to do so.

(B) Contents

Such notice shall be in the form and contain the information the Secretary requires, including evidence that the State has notified each local educational agency in the State of such State's intention to consider such payments in providing State aid.

(2) Opportunity to present views

Before making a determination under subsection (b) of this section, the Secretary shall afford the State, and local educational agencies in the State, an opportunity to present their views.

(3) Qualification procedures

If the Secretary determines that a program of State aid qualifies under subsection (b) of this section, the Secretary shall—

(A) certify the program and so notify the State; and

(B) afford an opportunity for a hearing, in accordance with section 7011(a) of this title, to any local educational agency adversely affected by such certification.

(4) Non-qualification procedures

If the Secretary determines that a program of State aid does not qualify under subsection (b), the Secretary shall—

(A) so notify the State; and

(B) afford an opportunity for a hearing, in accordance with section 7711(a) of this title, to the State, and to any local educational agency adversely affected by such determination.

(d) Treatment of State aid

(1) In general

If a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under this subchapter or under the Act of September 30, 1950

(Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] (as such Act was in effect on the day preceding October 20, 1994) for any fiscal year may be taken into consideration by such State in determining the relative—

(A) financial resources available to local educational agencies in that State; and

(B) financial need of such agencies for the provision of free public education for children served by such agency, except that a State may consider as local resources funds received under this subchapter or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] (as such Act was in effect on the day preceding October 20, 1994) only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues.

(2) Prohibition

A State may not take into consideration payments under this subchapter or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] (as such Act was in effect on the day preceding October 20, 1994) before such State's program of State aid has been certified by the Secretary under subsection (c)(3) of this section.

(e) Remedies for State violations

(1) In general

The Secretary or any aggrieved local educational agency may, not earlier than 150 days after an adverse

determination by the Secretary against a State for violation of subsections (a) or (d)(2) of this section or for failure to carry out an assurance under subsection (b)(3)(B) of this section, and if an administrative proceeding has not been concluded within such time, bring an action in a United States district court against such State for such violations or failure.

(2) Immunity

A State shall not be immune under the 11th amendment to the Constitution of the United States from an action described in paragraph (1).

(3) Relief

The court shall grant such relief as the court determines is appropriate.

History: (April 11, 1965, P.L. 89-10, Title VIII, § 8009, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3764; Sept. 16, 1996, P.L. 104-195, § 10, 110 Stat. 2384; Oct. 30, 2000, P.L. 106-398, § 1, 114 Stat. 1654; Jan. 8, 2002, P.L. 107-110, Title VIII, § 804, 115 Stat. 1956.)

20 U.S.C. § 7711

§ 7711. Administrative hearings and judicial review

(a) Administrative hearings

A local educational agency and a State that is adversely affected by any action of the Secretary under this subchapter or under the Act of September 30, 1950 (Public Law 874, 81st Congress) (as such Act was in effect on the day preceding October 20, 1994) shall be entitled to a hearing on such action in the same manner as if such agency were a person under chapter 5 of Title 5.

(b) Judicial review of Secretarial action

(1) In general

A local educational agency or a State aggrieved by the Secretary's final decision following an agency proceeding under subsection (a) of this section may, within 60 days after receiving notice of such decision, file with the United States court of appeals for the circuit in which such agency or State is located a petition for review of that action. The clerk of the court shall promptly transmit a copy of the petition to the Secretary. The Secretary shall then file in the court the record of the proceedings on which the Secretary's action was based, as provided in section 2112 of Title 28.

(2) Findings of fact

The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive, but the court, for good cause shown, may remand the case to the

Secretary to take further evidence. The Secretary may thereupon make new or modified findings of fact and may modify the Secretary's previous action, and shall file in the court the record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(3) Review

The court shall have exclusive jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

History: (April 11, 1965, P.L. 89-10, Title VIII, § 8011, as added Oct. 20, 1994, P.L. 103-382, Title I, § 101, 108 Stat. 3768.)

Pub. L. No. 106-398, section 1814.

SEC. 1814. ADMINISTRATIVE HEARINGS AND JUDICIAL REVIEW.

(a) ADMINISTRATIVE HEARINGS.—

(1) IN GENERAL.—Section 8011(a) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7711) is amended by adding at the end before the period the following: "if the local educational agency or State, as the case may be, submits to the Secretary a request for the hearing not later than 60 days after the date of the action of the Secretary under this title".

(2) EFFECTIVE DATE.—The amendment made by paragraph (1) shall apply with respect to an action of the Secretary under title VIII of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7701 et seq.) initiated on or after the date of the enactment of this Act.

(b) JUDICIAL REVIEW OF SECRETARIAL ACTION.—Section 8011(b)(1) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 7711(b)(1)) is amended by striking "60 days" and inserting 30 working days (as determined by the local educational agency or State)".

20 U.S.C. § 240(d)(repealed).

(d) Treatment of payments by States to determine eligibility for, and amount of, State aid; notice and opportunity for hearing; "State aid" and "equalize expenditures" defined; State equalization

(1) Except as provided in paragraph (2), no payments may be made under this subchapter for any fiscal year to any local educational agency in any State (A) if that State has taken into consideration payments under this subchapter in determining—

> (i) the eligibility of any local educational agency in that State for State aid for free public education of children; or
>
> (ii) the amount of such aid with respect to any such agency;

during that fiscal year or the preceding fiscal year, or (B) if such State makes such aid available to local educational agencies in such a manner as to result in less State aid to any local educational agency which is eligible for payments under this subchapter than such agency would receive if such agency were not so eligible.

(2)(A) Notwithstanding paragraph (1) of this subsection, if a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under this subchapter for any fiscal year may be taken into consideration by such State in determining the relative—

(i) financial resources available to local educational agencies in that State; and

(ii) financial need of such agencies for the provision of free public education for children served by such agency, provided that a State may consider as local resources funds received under this subchapter only in proportion to the share that local revenues covered under a State equalization program are of total local revenues.

The increase in payments described in sections 238(d)(2)(B), 238(d)(2)(C), 238(d)(2)(D), and 238(d)(3)(B)(ii) of this title shall not be taken into consideration by the State for the purpose of this subparagraph. Whenever a State educational agency or local educational agency will be adversely affected by the operation of this subsection, such agency shall be afforded notice and an opportunity for a hearing prior to the reduction or termination of payments pursuant to this subsection.

(B) The terms "State aid" and "equalize expenditures" as used in this subsection shall be defined by the Secretary by regulation, after consultation with State and local educational agencies affected by this subsection, provided that the term "equalize expenditures" shall not be construed in any manner adverse to a program of State aid for free public education which provides for taking into consideration the additional cost of providing free public education for particular groups or categories of pupils in meeting the special educational needs of such children as handicapped children, economically disadvantaged, those who need bilingual education, and gifted and talented children.

(C) In the application of subparagraph (A) of this paragraph to any State having a program described in such

subparagraph (A) in effect on October 12, 1976, no payment may be withheld from and no repayment may be required of any State or local educational agency for any period prior to promulgation of final regulations, or, if the State is not in conformance with such regulations, until July 1, 1977.

(C)(i) If a State desires to take payments under this section into consideration as provided in this paragraph for any fiscal year, that State shall, not later than sixty days prior to the beginning of such fiscal year, submit notice to the Secretary of its intention to do so. Such notice shall be in such form and be accompanied by such information as to enable the Secretary to determine the extent to which the program of State aid of that State is consistent with the provisions of subparagraph (A). In addition, such notice shall be accompanied by such evidence as the Secretary finds necessary that each local educational agency in that State has been given notice of the intention of the State. If the Secretary determines that the program of State aid of a State submitting notice under this subparagraph is consistent with the provisions of subparagraph (A), the Secretary shall certify such determination to that State.

(ii) Prior to certifying any determination under division (i) for any State for any fiscal year, the Secretary shall give the local educational agencies in that State an opportunity for a hearing at which such agencies may present their views with respect to the consistency of the State aid program of that State with the provisions of subparagraph (A).

(iii) The Secretary shall not finally deny to any State for any fiscal year certification of a determination under division (i) without first giving that State an opportunity for a hearing.

NEW MEXICO STATUTES ANNOTATED
CHAPTER 22. PUBLIC SCHOOLS
ARTICLE 8. PUBLIC SCHOOL FINANCE

§ 22-8-25. State equalization guarantee distribution; definitions; determination of amount

A. The state equalization guarantee distribution is that amount of money distributed to each school district to ensure that the school district's operating revenue, including its local and federal revenues as defined in this section, is at least equal to the school district's program cost.

B. "Local revenue", as used in this section, means seventy-five percent of receipts to the school district derived from that amount produced by a school district property tax applied at the rate of fifty cents ($.50) to each one thousand dollars ($1,000) of net taxable value of property allocated to the school district and to the assessed value of products severed and sold in the school district as determined under the Oil and Gas Ad Valorem Production Tax Act [7-32-1 NMSA 1978] and upon the assessed value of equipment in the school district as determined under the Oil and Gas Production Equipment Ad Valorem Tax Act [7-34-1 NMSA 1978].

C. "Federal revenue", as used in this section, means receipts to the school district, excluding amounts that, if taken into account in the computation of the state equalization guarantee distribution, result, under federal law or regulations, in a reduction in or elimination of federal school funding otherwise receivable by the school district, derived from the following:

(1) seventy-five percent of the school district's share of forest reserve funds distributed in accordance with Section

22-8-33 NMSA 1978; and

(2) seventy-five percent of grants from the federal government as assistance to those areas affected by federal activity authorized in accordance with Title 20 of the United States Code, commonly known as "PL 874 funds" or "impact aid".

D. To determine the amount of the state equalization guarantee distribution, the department shall:

(1) calculate the number of program units to which each school district is entitled using an average of the MEM on the eightieth and one hundred twentieth days of the prior year; or

(2) calculate the number of program units to which a school district operating under an approved year-round school calendar is entitled using an average of the MEM on appropriate dates established by the department; or

(3) calculate the number of program units to which a school district with a MEM of two hundred or less is entitled by using an average of the MEM on the eightieth and one hundred twentieth days of the prior year or the fortieth day of the current year, whichever is greater; and

(4) using the results of the calculations in Paragraph (1), (2) or (3) of this subsection and the instructional staff training and experience index from the October report of the prior school year, establish a total program cost of the school district;

(5) calculate the local and federal revenues as defined in this section;

(6) deduct the sum of the calculations made in Paragraph (5) of this subsection from the program cost established in Paragraph (4) of this subsection;

(7) deduct the total amount of guaranteed energy savings contract payments that the department determines will be made to the school district from the public school utility conservation fund during the fiscal year for which the state equalization guarantee distribution is being computed; and

(8) deduct ninety percent of the amount certified for the school district by the department pursuant to the Energy Efficiency and Renewable Energy Bonding Act [6-21D-1 NMSA 1978], if that act becomes law pursuant to House Bill 32 or similar legislation of the first session of the forty-seventh legislature.

E. Reduction of a school district's state equalization guarantee distribution shall cease when the school district's cumulative reductions equal its proportional share of the cumulative debt service payments necessary to service the bonds issued pursuant to the Energy Efficiency and Renewable Energy Bonding Act [6-21D-1 NMSA 1978], if that act becomes law pursuant to House Bill 32 or similar legislation of the first session of the forty-seventh legislature.

F. The amount of the state equalization guarantee distribution to which a school district is entitled is the balance remaining after the deductions made in Paragraphs (6) through (8) of Subsection D of this section.

G. The state equalization guarantee distribution shall be distributed prior to June 30 of each fiscal year. The calculation shall be based on the local and federal revenues

specified in this section received from June 1 of the previous fiscal year through May 31 of the fiscal year for which the state equalization guarantee distribution is being computed. In the event that a school district has received more state equalization guarantee funds than its entitlement, a refund shall be made by the school district to the state general fund.

History: 1953 Comp., § 77-6-19, enacted by Laws 1969, ch. 180, § 19; 1971, ch. 263, § 9; 1972, ch. 90, § 1; reenacted by Laws 1974, ch. 8, § 16; 1975, ch. 119, § 3; 1979, ch. 268, § 2; 1979, ch. 278, § 1; reenacted by Laws 1981, ch. 176, §§ 3, 4, 5; 1986, ch. 32, § 20; 1986, ch. 33, § 16; 1988, ch. 63, § 1; 1988, ch. 64, § 29; 1989, ch. 258, § 1; 1990, ch. 94, § 3; 1993, ch. 226, § 23; 1993, ch. 231, § 14; 1997, ch. 40, § 8; 1999, ch. 275, § 1; 2002, ch. 63, § 1; 2005, ch. 176, § 12; 2005, ch. 291, § 1.

34 C.F.R. Part 222, Subpart K (including Appendix to Subpart K).

Subpart K—Determinations Under Section 8009 of the Act

§ 222.160 What are the scope and purpose of this subpart?

(a) *Scope*. This subpart applies to determinations made by the Secretary under section 8009 of the Act.

(b) *Purpose*. The sole purpose of the regulations in this subpart is to implement the provisions of section 8009. The definitions and standards contained in this subpart apply only with respect to section 8009 and do not establish definitions and standards for any other purpose.

(Authority: 20 U.S.C. 7709)

§ 222.161 How is State aid treated under section 8009 of the Act?

(a) *General rules*. (1) A State may take into consideration payments under sections 8002 and 8003(b) of the Act (including hold harmless payments calculated under section 8003(e)) in allocating State aid if that State has a State aid program that qualifies under § 222.162, except as follows:

(i) Those payments may be taken into consideration for each affected local educational agency (LEA) only in the proportion described in § 222.163.

(ii) A State may not take into consideration that portion of an LEA's payment that is generated by the

portion of a weight in excess of one under section 8003(a)(2)(B) of the Act (children residing on Indian lands) or payments under section 8003(d) of the Act (children with disabilities), section 8003(f) of the Act (heavily impacted LEAs) and section 8003(g) of the Act (LEAs with high concentrations of children with severe disabilities).

(iii) A State may not take into consideration increases in payment under the following subsections of section 3(d) of Pub. L. 81-874:

(A) Section 3(d)(2)(B) (increase for heavily impacted LEAs).

(B) Section 3(d)(2)(C) (increase for children with disabilities and children with specific learning disabilities).

(C) Section 3(d)(2)(D) (increase for children residing on Indian lands).

(D) Section 3(d)(3)(B)(ii) (increase for unusual geographical factors).

(2) No State aid program may qualify under this subpart if a court of that State has determined by final order, not under appeal, that the program fails to equalize expenditures for free public education among LEAs within the State or otherwise violates law, and if the court's order provides that the program is no longer in effect.

(3) No State, whether or not it has an equalization program that qualifies under § 222.162, may, in allocating State aid, take into consideration an LEA's eligibility for

payments under the Act if that LEA does not apply for and receive those payments.

(4) Any State that takes into consideration payments under the Act in accordance with the provisions of section 8009 in allocating State aid to LEAs must reimburse any LEA for any amounts taken into consideration for any fiscal year to the extent that the LEA did not in fact receive payments in those amounts during that fiscal year.

(5) A State may not take into consideration payments under the Act or under Public Law 874 before the State's State aid program has been certified by the Secretary.

(b) *Data for determinations.* (1) Except as provided in paragraph (b)(2) of this section, determinations under this subpart requiring the submission of financial or school population data must be made on the basis of final data for the second fiscal year preceding the fiscal year for which the determination is made if substantially the same program was then in effect.

(2)(i) If the Secretary determines that the State has substantially revised its State aid program, the Secretary may certify that program for any fiscal year only if—

(A) The Secretary determines, on the basis of projected data, that the State's program will meet the disparity standard described in § 222.162 for the fiscal year for which the determination is made; and

(B) The State provides an assurance to the Secretary that, if final data do not demonstrate that the State's program met that standard for the fiscal year for which the determination is made, the State will pay to

each affected LEA the amount by which the State reduced State aid to the LEA.

(ii) Data projections submitted by a State must set forth the assumptions upon which the data projections are founded, be accompanied by an assurance as to their accuracy, and be adjusted by actual data for the fiscal year of determination that must be submitted to the Secretary as soon as these data are available.

(c) *Definitions*. The following definitions apply to this subpart:

Current expenditures means the total charges incurred for the benefit of the school year in an elementary (including pre-kindergarten) or secondary school program. "Current expenditures" does not include—

(1) Expenditures for capital outlay;

(2) Expenditures for debt service for capital outlay;

(3) Expenditures from State sources for special cost differentials of the type specified in § 222.162(c)(2);

(4) Expenditures of revenues from local or intermediate sources that are designated for special cost differentials of the type specified in § 222.162(c)(2);

(5) Expenditures of funds received by the agency under sections 8002 and 8003(b) (including hold harmless payments calculated under section (e)) or under Pub. L. 81-874 that are not taken into consideration under the State aid program and exceed the proportion of those funds that the State would be allowed to take into

consideration under § 222.163; or

(6) Expenditures of funds received by the agency under Pub. L. 81-874 that were not taken into consideration under the State aid program and exceed the proportion of funds the State was permitted to take into consideration under that law.

Equalize expenditures means to meet the standard set forth in § 222.162.

Local tax revenues means compulsory charges levied by an LEA or by an intermediate school district or other local governmental entity on behalf of an LEA for current expenditures for educational services. "Local tax revenues" include the proceeds of ad valorem taxes, sales and use taxes, income taxes and other taxes. Where a State funding formula requires a local contribution equivalent to a specified mill tax levy on taxable real or personal property or both, "local tax revenues" include any revenues recognized by the State as satisfying that local contribution requirement.

Local tax revenues covered under a State equalization program means "local tax revenues" as defined in paragraph (c) of this section contributed to or taken into consideration in a State aid program subject to a determination under this subpart, but excluding all revenues from State and Federal sources.

Revenue means an addition to assets that does not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds.

Furthermore, the term "revenue" includes only revenue for current expenditures.

State aid means any contribution, no repayment for which is expected, made by a State to or on behalf of LEAs within the State for current expenditures for the provision of free public education.

Total local tax revenues means all "local tax revenues" as defined in paragraph (c) of this section, including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(Authority: 20 U.S.C. 7709)

[60 FR 50774, 50797, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

(a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups*. If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations*. In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses "weighted pupil," "classroom," "instructional unit," or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. The two allowable categories of special cost differentials are—

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English

speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

(d) *Revenues and current expenditures included in determinations.* All revenues or current expenditures must be included for each LEA in the State in determining the percentage of disparity under paragraph (a) of this section.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 7709)

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709(d)(1)(B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in § 222.161(a)(1)(ii) and (iii), the proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 may be applied by a State to actual receipts of those payments or payments under Pub. L. 81-874.

(Authority: 20 U.S.C. 7709(d)(1)(B))

§ 222.164 What procedures does the Secretary follow in making a determination under section 8009?

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to the State and all LEAs in the State and provide them with a complete copy of the submission initiating the proceeding. In addition, the party initiating the proceeding shall notify the State and all LEAs in the State of their right to request from the Secretary, within 30 days of the initiation of a proceeding, the opportunity to present their views to the Secretary before the Secretary makes a determination.

(b) *Submission*. (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2)(i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with § 222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with § 222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in § 222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in § 222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time results in a summary determination by the Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an opportunity to present their views as follows:

(i) Upon receipt of a timely request for a predetermination hearing, the Secretary notifies all LEAs and the State of the time and place of the predetermination hearing.

(ii) Predetermination hearings are informal and any LEA and the State may participate whether or not they requested the predetermination hearing.

(iii) At the conclusion of the predetermination hearing, the Secretary holds the record open for 15 days for the submission of post-hearing comments. The Secretary may extend the period for post-hearing comments for good cause for up to an additional 15 days.

(iv) Instead of a predetermination hearing, if the party or parties requesting the predetermination hearing agree, they may present their views to the Secretary exclusively in writing. In such a case, the Secretary notifies all LEAs and the State that this alternative procedure is being followed and that they have up to 30 days from the date of the notice in which to submit their views in writing. Any LEA or the State may submit its views in writing within the specified time, regardless of whether it requested the opportunity to present its views.

(c) *Determinations*. The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a hearing to the State or any LEA adversely affected by the determination.

(Approved by the Office of Management and Budget under control number 1810-0036)

(Authority: 20 U.S.C. 7709)

NOTE TO PARAGRAPH (b)(2) OF THIS SECTION: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35419, July 1, 1997]

§ 222.165 What procedures does the Secretary follow after making a determination under section 8009?

(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 30 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a

time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* (1) The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(2) The ALJ is bound by all applicable statutes and regulations and may neither waive them nor rule them invalid.

(f) *Filing requirements.* (1) Any written submission under this section must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is—

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the

document was received by the Department.

(5) Any party filing a document by facsimile transmission must file a follow-up hard copy by hand-delivery or mail within a reasonable period of time.

(g) *Procedural rules*. (1) If, in the opinion of the ALJ, no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford each party to the proceeding an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford the following procedures to each party:

(i) Sufficient notice of the issues to be considered at the hearing.

(ii) An opportunity to make a record of the proceedings.

(iii) An opportunity to present witnesses on the party's behalf.

(iv) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(h) *Decisions*. (1) The ALJ—

(i) Makes written findings and an initial decision based upon the hearing record; and

(ii) Forwards to the Secretary, and mails to each party, a copy of the written findings and initial decision.

(2) Appeals to the Secretary and the finality of initial decisions under section 8009 are governed by §§ 222.157(b), 222.158, and 222.159 of subpart J of this part.

(Authority: 20 U.S.C. 7709)

(i) *Corrective action.* (1) Within 30 days after a determination by the Secretary that a State has been in violation of section 8009 unless the determination is timely appealed by the State, the State shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(2) A State found by the Secretary to have been in violation of section 8009 following a hearing shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(3) At any time during a hearing under this subpart, a State may provide the Secretary appropriate assurances that it will undertake corrective action if necessary. The Secretary or the ALJ, as applicable, may stay the proceedings pending completion of corrective action.

(Authority: 20 U.S.C. 7709)

[60 FR 50778, Sept. 29, 1995, as amended at 62 FR 35420, July 1, 1997]

§§ 222.166-222.169 [Reserved]

APPENDIX TO SUBPART K— DETERMINATIONS UNDER SECTION 8009 OF THE ACT— METHODS OF CALCULATIONS FOR TREATMENT OF IMPACT AID PAYMENTS UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

1. Determinations of disparity standard compliance under § 222.162(b)(1).

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those

agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $ 820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820 = $180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

(b) In cases under § 222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the weighted average disparity percentage for the State as a whole is determined by—

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in paragraph (b)(I); and

(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

EXAMPLE

Group 1 (grades 1-6), 80,000 pupils x 18.00%	=14,400
Group 2 (grades 7-12), 100,000 pupils x 22.00%	=22,000
Group 3 (grades 1-12), 20,000 pupils x 35.00%	= 7,000
Total 200,000 pupils	43,400
43,400/200,000 = 21.70% Disparity	

2. Determinations under § 222.163(b) as to maximum proportion of payments under the Act that may be taken into consideration by a State under an equalization program. The proportion that local tax revenues covered under a State equalization program are of total local tax revenues for a particular LEA shall be obtained by dividing: (a) The amount of local tax revenues covered under the equalization program by (b) the total local tax revenues attributable to current expenditures within the LEA. Local revenues that can be excluded from the proportion computation are those received from local non-tax sources such as interest, bake sales, gifts, donations, and in-kind contributions.

Examples

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution based on a uniform tax levy. The LEA contribution from the uniform tax levy is considered under the equalization program. LEA X contributes the proceeds of the uniform tax levy, $700 per pupil, and the State contributes the $200 difference. No other local tax revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent

($700/$700). If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 2. The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil not covered under the equalization program. The permissible levy is not included in local tax revenues covered under the equalization program but it is included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 87.5 percent ($700/$800). If LEA X receives $100 per pupil in payments under the Act, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now contribute $112.50 per pupil as the difference.

Example 3. State B has an equalization program under which each LEA is guaranteed $900 per pupil for contributing the equivalent of a two mill tax levy. LEA X contributes $700 per pupil from a two mill tax levy and an additional $500 per pupil from local interest, bake sales, in-kind contributions, and other non-tax local sources. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). The local revenue received from interest, bake sales, in-kind contributions and other non-tax local revenues are excluded from the computation since they are from non-tax sources. If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative

financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 4. State C has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an eight mill rate the guarantee is $500, for nine mills $550, for 10 mills $600. LEA X levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option realizing another $300 per pupil. The $300 proceeds of the local leeway option are not included in local tax revenues covered under the equalization program, but they are included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 50 percent ($300/$600). If LEA X receives $100 per pupil in payments under the Act, $50 per pupil may be taken into consideration. LEA X may be regarded as contributing $350 per pupil under the program and State B would now contribute $250 as the difference.

Example 5. The initial facts are the same as in Example 4, except that LEA Y in State C, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA X, realizes $550 per pupil for each tax. As with LEA X, the percentage of payments under the Act that may be taken into consideration for LEA Y is 50 percent (550/1100). If LEA Y receives $150 per pupil in payments under the Act, then up to $75 per pupil normally could be taken into consideration. However, since LEA Y would have received only $50 per pupil in State aid, only $50 of the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

Former 34 C.F.R. 222.63 (1993)

§ 222.63 Disparity standard

(a) *25 percent disparity limitation.* The Secretary will consider a program of State aid to have fulfilled the requirement of § 222.62(d) of this subpart if the disparity in the amount of current expenditures or revenue per pupil for free public education among local educational agencies in the State is no more than 25 percent for the fiscal year for which a determination is made under this subpart. The method for calculating the percentage of that disparity in a State is set out in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of local educational agencies in the State which have similar grade levels of instruction.

(2) In those cases, the weighted average disparity, based on the proportionate number of pupils in each group, may not be more than 25 percent for all the groups. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on the following bases:

(1) Except as provided in paragraph (c)(2) of this section, the per pupil amount of current expenditures or revenue for a local educational agency is computed on the basis of the total number of pupils receiving free public

education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses a "weighted pupil," a "classroom," "instructional unit," or other designated unit of need in determining allocations of State aid in order to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. There are two allowable categories of special cost differentials: (i) Those associated with pupils having special educational needs, such as handicapped children, economically disadvantaged children, non-English speaking children, and gifted and talented children; and (ii) those associated with sparsity or density of population, cost of living, or special socioeconomic characteristics within the area served by an agency.

(d) *Revenues and current expenditures included in determinations.* The following revenues or current expenditures must be included for each local educational agency in the State in determining the percentage of disparity under paragraph (a) of this section:

(1) All revenues or current expenditures from State sources, except those applied or contributed outside any equalized part of the State aid program which are designated for special cost differentials of the type specified in paragraph (c)(2) of this section.

(2) All revenues for current expenditures from local or intermediate sources, except those taken into consideration under any equalized part of the State aid program which are designated for special cost differentials of the type specified in paragraph (c)(2) of this section.

(3) Pub. L. 81-874 funds received by the agency under sections 2, 3 and 4 of the Act, except to the extent that (i) they are not taken into consideration under the State aid program, and (ii) they exceed the proportion of those funds that the State would be allowed to take into consideration under § 222.66 of this subpart; and

(4) Any other Federal funds received by the agency for which the agency is not accountable to the Federal Government for their use such as Federal Forest Reserve funds (16 U.S.C. 500).

(Authority: 20 U.S.C. 240(d)(2))

[42 FR 15546, Mar. 22, 1977. Re-designated at 45 FR 77368, Nov. 21. 1980, and amended at 54 FR 37257, Sept. 7. 1989]

Appendix to former 34 C.F.R. Part 222 (1993).

APPENDIX TO PART 222

[Pub. L. 81-874, Section 5(d)]

ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES; METHODS OF CALCULATIONS FOR TREATMENT OF PAYMENT UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs described the methods for making certain calculations in conjunction with determinations made under various requirements of the regulations set forth in this subpart. These methods shall be the only methods used in making these calculations.

1. *Determinations of disparity standard compliance under § 222. 63(b)(1).*

The determination of disparity in current expenditures or revenue per pupil is made by:

(a) Ranking all local educational agencies having similar grade levels within the State on the basis of current expenditures or revenues per pupil with respect to the fiscal year for which data has been submitted in accordance with these regulations;

(b) Identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of these agencies; and

(c) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (b) and dividing the difference by the lower figure.

Example: In state X, after ranking all local educational agencies organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in these agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1000. The percentage disparity between the 95th and 5th local educational agencies is 22 percent ($1000-$820-$180÷$820). The program would be deemed to qualify.

(d) In cases under § 222.63(b), where separate computations are made for different groups of local educational agencies, the disparity percentage for each group is obtained in the manner described in paragraphs (a), (b) and (c) above. Then the weighted average disparity percentage as for the State as a whole is determined by:

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in (i); and

(iii) Dividing the sum obtained in (ii) by the total number of pupils for all the groups.

Example: For State Y three groups of local educational agencies were considered, Group No. 1 (grades 1-6) had a disparity percentage of 18 percent and 80,000 pupils. Group No. 2 (grades 7-12) had a disparity percentage of 22 percent and 100,000 pupils. Group No. 3 (grades 1-12) had a disparity percentage of 35 percent and 20,000 pupils. The figure obtained under (i) is 14,400 for group No. 1, 22,000 for group No. 2, and 7000 for group No. 3. The sum of these figures under (ii) is 43,400. Dividing that number by the total number of pupils for all three groups (200,000) gives a weighted average percentage of 21.7 percent. State Y meets the requirement of § 222.63(b).

2. *Determination under § 222.63(b) as to maximum proportion of Pub. L. 81-374 payments that may be taken into consideration by a State under an equalization program.* The proportion that local revenues covered under a State equalization program are of total local revenues for a

particular local educational agency shall be obtained by dividing: (a) the amount of local revenues covered under the equalization program by (b) the total local revenues attributable to current education within the agency.

Examples.

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution based on a uniform tax levy. LEA X contributes $700 per pupil and the State contributes the $200 difference. No other local revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act which may be taken into consideration by State A for LEA X is 100% (700/700). If LEA X receives $100 per pupil in Pub. L. 81-874 funds. $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 2. The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil. The percentage of Pub. L. 81-874 funds which may be taken into consideration is 87.5% (700/800). If LEA X receives $100 per pupil in Pub. L. 81-874 funds, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now Contribute $112.50 per pupil as the difference.

Example 3. State B has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an 8 mill rate the

guarantee is $500, for 9 mills $550, for 10 mills $600. LEA Y levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option, realizing another $300 per pupil. The percentage of Pub. L. 81-874 which may be taken into consideration is 50% (300/600). If LEA Y receives $100 per pupil in Pub. L. 81-874 funds, $50 per pupil may be taken into consideration. LEA Y may be regarded as contributing $350 per pupil under the program and State B would not contribute $250 as the difference.

Example 4. The initial facts are the same as in Example 3, except that LEA Z in State B, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA Y, realizes $550 per pupil for each tax. As with LEA Y, the Percentage of Pub. L. 81-874 funds which may be taken into consideration for LEA Z is 50% (550/1100). If LEA Z receives $150 per pupil in Pub. L. 81-874 funds, then up to $75 per pupil normally could be taken into consideration. However, since LEA Z would have received only $50 per pupil in State aid, only $50 on the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

Example 5. The initial facts are the same as in Example 4, except that LEA Z realizes $600 per pupil from each of the 10 mill taxes. Since LEA Z is regarded as contributing $600 to the equalization program and receives no State aid, no Pub. L. 81-874 funds are taken into consideration under the program.

3. Examples of wealth neutrality calculations under § 222.64.

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the LEA contribution derived from a uniform required tax of 20 mills.

A minimum of $100 per pupil in paid even if the required tax produces more than $900. Each LEA is permitted to levy additional local taxes. Additional categorical State aid is made available for special cost programs. The State has no limitations on budget, expenditure or local tax effort increases. The State is composed of three LEA's with data as shown.

	LEA No. 1	LEA No. 2	LEA No. 3
Taxable wealth per pupil	$30,000	$60,000	$20,000
Enrollment	2,000	1,000	1,000
Yield per pupil from required local tax	$600	$1,200	$400
Equalized State aid per pupil	300	100	500
Additional local tax per pupil	100	300	70
Additional State aid per pupil	160	150	155
Total State, intermediate, and local revenues per pupil	1,160	1,750	1,125

LEA No. 1

The $600 per pupil derived from the required local tax rate and the $300 per pupil in State equalization aid are

neutral since $900 per pupil was the least amount realized by any LEA for the same required tax effort. One third of the $100 per pupil from the additional local tax is not neutral since the least wealthy LEA, #3, could only realize two-third of the revenue that LEA #1 could at the same tax rate. The $160 per pupil of State categorical aid is neutral. Thus, $1,127 per pupil ($600+$300+ ⅔ of $100+$160) is wealth neutral and $33 per pupil is not neutral.

LEA No. 2

Of the $1,200 per pupil derived from local required effort $900 is neutral since that was the least amount realized by any LEA for the required local tax rate. The $300 per pupil above the guarantee and the $100 per pupil minimum State equalization aid are not neutral since they exceed the least amount realized by another agency. Two-thirds of the $300 per pupil realized on the additional local tax, $200, is not neutral since the least wealthy, LEA #3, could only realize one-third of the revenue that LEA #2 could at the same rate. The $150 per pupil of State categorical aid is neutral. Thus, $1,150 per pupil ($900+ ⅓ of $300+$150) is wealth neutral and $600 per pupil is not neutral.

LEA No. 3

The $400 per pupil derived from the required local tax rate and the $500 per pupil in State equalization aid are neutral since $900 is the least amount realized under the equalization program. All of the $70 per pupil realized from the additional local tax is neutral since LEA #3 is the least wealthy in the State. The $155 per pupil of State categorical aid is neutral. Thus, all of the $1,125 per pupil is neutral.

The calculation of the percentage of wealth neutral funds

for State A is as follows:

LEA No. 1 - Total revenues

Neutral	Not Neutral
$1,127 per pupil	$33 per pupil
x2,000 pupils	x2,000 pupils
$2,254,000	$66,000

LEA No. 2 - Total revenues

Neutral	Not Neutral
$1,150 per pupil	$600 per pupil
x1,000 pupils	x1,000 pupils
$1,150,000	$600,000

LEA No. 3 - Total revenues

$1,125 per pupil	None
x1,000 pupils	
$1,125,000	

Total neutral revenues $4,529,000
Total State, intermediate, and local revenues $5,195,000

= 87.2 pct neutral

Thus, State A qualifies under § 222.64(a).

Example 2. State B in the prior year had an equalization program which required a 5 mill effort and allowed 5 mills additional leeway. For the required 5 mill effort each LEA was guaranteed $600 per pupil. LEA 2, on a wealth base of $60,000 per pupil, levied the full 10 mills producing $300 per pupil received $300 per pupil of State basic aid, and with the $300 per pupil leeway yield, had revenues of $900 per pupil. LEA #2, on a wealth base of $160,000 per pupil, also levied the full 10 mills producing $800 per pupil from the required 5 mills which exceed the guarantee and thus received no State basic aid. The 5 mill leeway yielded an additional $800 per pupil for a total of $1,600 per pupil.

The State has instituted a new program raising the guarantee to $900 per pupil with a 10 percent budget increase limitation. LEA #1, (with 2,000 pupils), now realizes $300 per pupil from its required effort, receives $600 of State basic aid, received $300 per pupil 1.5 mills of local leeway for a yield of $90 per child because of its budget restraint of $990 per child. ($900 per child plus 10 percent), LEA #2 (with 1,000 pupils), realizes $800 per pupil from its required effort, receives $100 per pupil in State equalization aid, levies 5 mills leeway for another $800 per pupil for a total of $1,700 per pupil which is still within its budget increase limitation of $1,760 per pupil.

Assuming that no other LEA is restrained below the $900 per pupil guarantee and that LEA #1 is the most restrained at $90 per pupil leeway then all of the revenues of LEA #2 above that level are not neutral.

The percentage of neutrality for the State is calculated in the same way as in Example 1. Assuming there are no other LEA's, the percentage of wealth neutral revenues is 80.7, and

State B does not qualify.

Example 3. State C has an equalization program under which each LEA is guaranteed $900 per weighted pupil or 110 percent of the prior year's per weighted pupil revenue under the program, whichever is less, minus the LEA contribution derived from a required tax which is uniform for all LEA's guaranteed $900 per pupil and proportionately less lot those LEA's guaranteed lesser amounts per pupil. No additional local leeway taxes are allowed. LEA #1 received $850 per pupil under the program in the prior year while LEA #2 received $800 per pupil under the program in the prior year. LEA #1 is limited to the $900 guarantee since 110 percent of its prior year's expenditure exceeds the $900 guarantee. LEA #2 qualifies for an $880 guarantee since 110 percent of $800 equals $880. LEA #2's required tax effort is also proportionately less.

Assume that neither LEA realizes revenues in excess of the guarantee. For LEA #1 (with 10,000 pupils), $880 of the $900 per pupil revenue is wealth neutral and for LEA #2 (with 2,000 pupils), all $880 in per pupil revenue is wealth neutral. (See § 222.64(b)(2)(iii)).

The percentage of neutrality for the State would be calculated as in Example 1. The percentage of wealth neutral revenues is 98.2 and the State qualifies under § 222.64(a).

Example 4. State D has an equalization program which permits different local tax efforts from 1 mill to 10 mills and which guarantees $100 per pupil for each mill levied. LEA #1 taxes at 5 mills and realizes $300 per pupil. Since the guarantee level for 5 mills is $500 per pupil, State D gives LEA #1 $200 in equalization aid. LEA #2 also taxes at 5 mills, but realizes $800 per pupil. Since the guarantee for 5

mills is only $500 per pupil, LEA #2 receives no equalization aid. LEA #3 taxes at 8 mills and realizes $400 per pupil. Since the guarantee at 8 mills is $800 per pupil. LEA #3 receives $400 in equalization aid. LEA #4 taxes at 8 mills, and realizes $1,000 per pupil. Since the guarantee for 8 mills is only $800 per pupil, LEA #4 receives no equalization aid. All of the funds LEA #1 realized under the equalization program are neutral since there is no excess over the guaranteed amount for 5 mills. $300 per pupil of the funds realized by LEA #2 are not neutral, because that is the amount in excess of the amount guaranteed for a 5 mill tax effort under the equalization program, and is attributable to the greater wealth of LEA #2.

All of the funds realized by LEA #3 under the equalization program are neutral since there is no excess over the guaranteed amount for an 8 mill tax effort, $200 per pupil realized by LEA #4 is not neutral, because that is the amount in excess of the guaranteed amount for an 8 mill tax effort under the equalization program and is attributable to the greater wealth of LEA #4.

Example 5. State E has a foundation-type equalization program under which each LEA receives funds for a teacher salary, based on a salary schedule, for each 25 pupils in average daily attendance with additional teacher units allocated for small or sparsely populated districts, and special education programs such as handicapped and vocational classes. Each district also receives under the program a set amount of dollars per teacher unit for expenses other than salaries. Each LEA must make a tax effort of 10 mills to qualify for the foundation equalization aid. The yield from the 10 mills tax is deducted from the amount of the equalization guarantee. There are no State restrictions on budget, expenditure or tax effort increases over prior years.

No LEA in the State realizes more than the guaranteed amount for the 10 mill effort. All of the funds realized by all LEAs under the foundation equalization program are neutral. Any excess in the amount of revenues realized by any agency over that realized by any other are attributable to differences in the designated needs. (See § 222.61(b)(3)).

4. *Determination under § 222. 66 as to maximum proportion of Pub. L. 31-874 payments that may be taken into consideration by a State under an equalization program.*

[40 FR 16032, Apr. 8. 1975, as amended at 42 FR 65526, Dec. 30. 1977. Re-designated at 45 FR 77368, Nov. 21, 1980]

FEDERAL REGISTER

FRIDAY, JUNE 25, 1976

Part II: DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

Office of Education

SCHOOL ASSISTANCE IN FEDERALLY AFFECTED AREAS (IMPACT AID)

Title 45—Public Welfare

CHAPTER 1—OFFICE OF EDUCATION, DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

PART 115—ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES AND ARRANGEMENTS FOR EDUCATION OF CHILDREN WHERE LOCAL EDUCATIONAL AGENCIES CANNOT PROVIDE SUITABLE FREE PUBLIC EDUCATION

Interim Regulations for Treatment of Payments Under State Equalization Programs

A Notice of proposed rulemaking was published in the FEDERAL REGISTER on May 1, 1975 (40 FR 19114) setting forth proposed regulations for the treatment of Pub. L. 81-874 payments under State equalization programs as provided for in section 5(d)(3) of that Act for Fiscal Year 1975, and in section 5(d)(2) of that Act for Fiscal Year 1976 and

thereafter. Interested persons were given 30 days in which to submit written comments, suggestions, or objections regarding the proposed regulations.

As a result of such comments, interim regulations are being published, as set for below, to enable further public comments, suggestions, and recommendations. These interim regulations, when they become effective in accordance with section 431(d) of the General Education Provisions Act (20 U.S.C. 1232(d)), will govern determinations made under section 5(d), Publ L. 81-874, until final regulations are published and become effective.

Elsewhere in this issue of the FEDERAL REGISTER, these regulations have been incorporated by reference into a notice of proposed rulemaking related to section 5(d), Pub. L. 81-874. That notice proposes an amendment to § 115.62 of these interim regulations. Interested parties are invited to submit written comments, suggestions, or objections to the Office of Education, Division of School Assistance in federally Affected Areas, Room 2107, FOB-6, 400 Maryland Avenue, S.W., Washington, D.C. 20202. All relevant material received on or before July 26, 1976, will be considered. Comments submitted in writing will be available for review in the above office between the hours of 8:30 a.m. and 4:30 p.m. Monday through Friday.

A. SUMMARY OF STATUTORY AMENDMENT AND FINAL REGULATIONS

1. *Effect of Pub. L. 93-380.* Sections 304(c) (effective for Fiscal Year 1976 and thereafter) of Pub. L. 93-380 have amended section 5(d) of Pub. L. 81-874 to permit States to take into account payments under Title I of that Act in determining the relative financial resources available to local

educational agencies and relative financial need of those agencies if the State has in effect a program of State aid for free public education designed to equalize expenditures among local educational agencies in the State. However, Pub. L. 81-874 payments may be so taken into account only in the proportion that local revenues covered by those programs are of total revenues for education.

As mandated by the statute, these regulations implement the amendments to Pub. L. 81-874 by establishing standards for determining whether a State has in effect such a program, by defining certain terms, by establishing procedures for determinations pursuant to section 5(d)(2), and by setting forth the procedure for a hearing regarding those determinations.

2. *General rules.* Under § 115.61(b)(1), only a State whose program of State aid meets the standards set forth in § 115.62 may be excepted from the operation of section 5(d)(1) of the Act. However, these States may take into consideration only the proportion of Pub. L. 81-874 funds as permitted under § 115.63. In light of the many recent cases in State courts concerning the validity of State systems of school finance, § 115.61(b)(2) states that no State aid programs may qualify under these regulations if a State court has ruled that such a program violates law and the final ruling is not under appeal.

3. *Definitions.* Four terms have been defined: "State aid," "equalize expenditures," "current expenditures," and "revenue." The second of the foregoing is defined by reference to other sections of the regulations which set forth the qualifying standards for equalization programs.

4. *Qualifying standards.* Section 115.62 establishes

standards under which the Commissioner shall determine, for purposes of section 5(d)(2) of the Act, whether a State has a program of State aid designed to equalize expenditures among local educational agencies within that State. These standards have been developed in light of the legislative history of section 5(d) of the Act, which indicates that the Commissioner should promulgate regulations which afford only a limited and carefully constructed exception to the existing rule under section 5(d). (See, for example, the *Congressional Record*, daily edition, May 20, 1974, S 8607 and July 31, 1974, H 7401, 7412. Further reliance has been made upon: House Report No. 93-805, pages 42-43; Senate Report No 93-763, pages 55-56; Senate Report No. 93-1026, pages 162-163; and statements in the *Congressional Record* of March 27, 1974 at H 2228-2233, May 20, 1974 at S 8502-8505, 8604-8608, July 24, 1974 at S 13384, and July 31, 1974 at H 7396, 7401, and 7412.) In particular, the House Committee on Education and Labor print, *Public Law 874 and State Equalization Plans* (March 1974), specifically mentioned in House Report 93-805, has been used as a reference in establishing the evaluative standards.

Any State aid program in effect which apportions payments on a relative shared-cost basis among local educational agencies in the State will be considered an equalization type of program to which these regulations may be applied. An initial test of equalization effect of the program in terms of equalizing expenditures is then applied under § 115.62(b) by means of a disparity standard. If there is a disparity of no more than 25 per cent in revenues per pupil (or other unit of pupil need used in the State program) available ro the 95th and 5th percentile school districts (those with the 95th and 5th percentiles of the total number of pupils after being ranked in order of revenue per pupil), the program would be deemed to qualify under section 5(d)(2). A

disparity standard has been chosen because it is a method of evaluating school finance programs in terms of equalization that has been used both by the courts and authorities in the field of school finance, and because it is believed that the phrase "equalize expenditures" focuses upon the relative availability of funds to local educational agencies for educating the children within their school systems. "Revenue" data, as well as "expenditure" data is used because revenues generally reflect the amount of funds available for expenditure in a school district and because revenue data is more accessible for current fiscal year evaluation. In calculating the disparity, revenues or expenditures attributable to capital outlay or debt service are to be excluded. It is felt that such expenditures should not included because Pub L, 87-874 is a current expenditures program and capital expenditures are likely to fluctuate considerably from year to year. The exclusion of the upper and bottom 5 percentile school districts is based upon the accepted principle of statistical evaluation that such percentiles usually represent unique or noncharacteristic situations.

As discussed further below, a number of comments were received to the effect that a disparity standard alone did not give sufficient recognition to equalization programs based on principles of "fiscal neutrality". After due consideration, it was decided that a properly constructed standard could effectively measure programs emphasizing "fiscal neutrality" within the framework of "equalize expenditures" and should be incorporated into the regulation. This would complement the disparity standard already discussed in keeping with the intent expressed in Senate Report No. 93-763 (1974) that the Commissioner be flexible as to recognizing the types of equalization programs utilized by States. However, since a "fiscal neutrality" standard was not contained in the proposed

regulations published May 1, 1975, it has been deemed necessary to publish such an amendment as a proposed rule subject to public comment. Therefore, concurrently with the publication of these interim regulations, the commissioner is publishing a notice of proposed rulemaking encompassing the addition of a "fiscal neutrality" standard as a qualifying standard under this subpart. Of course, that additional regulation will not become effective until after it is published as a final regulation.

An exception clause in § 115.62(c) provides that State programs which do not meet the above disparity test may still be considered for the exemption if certain other conditions are fulfilled. This clause then provides for a determination by the Commissioner in reference to specified evaluative criteria. These criteria, while judgmental in nature, have been selected as reasonable parameters of a truly equalizing State aid program. Consideration under this clause is further conditioned upon the requirement that educational expenditures be more equalized within a State as a result of any offsetting of Pub. L. 81-874 payments.

It is further provided that, in applying the standards for qualification as an equalization program, disparities with respect to revenue per pupil in a State which are attributable to special education services shall not be considered in an adverse manner, so as to prevent a State program from qualifying. This exclusive treatment of special education costs is mandated by the statutory amendment.

5. *Proportionality determination.* Under this amendment to section 5(d), a State is limited as to how much of Pub. L. 81-874 payments going to a school district may be taken into consideration. Section 115.63 sets forth the statutory formula for determining what proportion local revenues under a State

equalization program are of total local revenues for education. The amendments to section 5(d) prohibit a State from taking Pub. L. 81-874 payments into account in excess of this proportion. The phrase "local revenues covered under a State equalization program: and "total local revenues" are clarified in the regulation to distinguish among various current expenditure revenues a school district might receive.

6. *Assurances*. A number of assurances are required of both State and local educational agencies with regard to the taking into consideration of Pub. L. 81-874 payments under a State aid program. Under § 115.64, a local educational agency will be required to insure that the State in which it is situated is acting in compliance with section 5(d) of the Act as regards that a ency. A State educational agency will be required to assure that it is acting in conformity with section 5(d) of the Act and these regulations, and that the State will restore to a school district any State aid not paid because of consideration of Pub. L. 81-874 payments not actually received. A failure on the part of either agency to provide these assurances will cause determination proceedings to be initiated under this subpart, but will not itself require suspension of payments under the Act.

7. *Determination procedures*. Provision is made in § 115.65 for proceedings to obtain determinations by the Commissioner under section 5(d)(2) at the initiation of an affected State or local educational agency or at the initiation of the Office of Education. Where the State educational agency, for example, desires an authoritative determination by the Commissioner whether and the extent to which section 5(d) permits it to take into consideration Pub. L. 81-874 payments in determining State aid, it may file with the Office of Education a submission seeking a determination. Also, where a local educational agency is adversely affected by a

State taking into consideration Pub. L. 81-874 payments, it may seek a determination as to the status of such a State practice under section 5(d). The adverse effect contemplated in this case would be the loss of State aid monies which the local agency would have received but for the State's action. (In such a situation, the concerned State agency would, of course, be asked to respond). Finally, the Office of Education itself, where it believes that a State may be acting in noncompliance with section 5(d), may initiate proceedings leading to an appropriate determination. Determinations ill be applicable only for the fiscal years in issue.

At the same time, the regulation provides that a determination by the Office of Education that taking into consideration Pub. L 81-874 payments under section 5(d)(2) is authorized would not have to be obtained before a State could commence such an action, if it were done in compliance with section 5(d)(2). For example, if a State, since the effective date of section 5(d)(2) , has been taking into consideration these payments under a State equalization program which qualifies under section 5(d)(2) and the regulations, and this State action is in the appropriate proportion for each local educational agency in the State, the fact that a determination by the Commissioner on the legality of this practice was not obtained in advance would not defeat the operation of section 5(d)(2) in providing an exception for the State. This rule, however, would not preclude the Commissioner from determining that a State had been in noncompliance with section 5(d)(2) during the time it acted without an advance determination.

In addition, provision is made for advance consultation with the Office of Education for States contemplating the adoption of equalization programs which would take into consideration Pub. L. 81-874 payments.

8. *Hearing procedures*. Section 115.66 establishes what parties may request a hearing, the time and place of hearings, the right to counsel for all parties, the conduct of the hearing, and the procedure for a final decision by the Commissioner. It further provides that there shall be no reduction or termination of Pub. L. 81-874 payments prior to a final decision and that, if a State which is found to be in noncompliance will cease and desist in its improper action and will make appropriate restitution to any local educational agency adversely affected by such an action, there will be no reduction or termination of Pub. L. 81-874 payments.

9. *Appendix*. An appendix has been added to these regulations setting forth the two different methods for making certain computational determinations established under these regulations. The first concerns disparity determinations under § 115.62(b)(1), and the second, determinations under § 115.63(b) of the maximum proportion of such payments which may be taken into consideration by a State. Each description of the method for making the appropriate computations is accompanied by one or more illustrative examples.

B. Summary of Comments, Responses and Changes in the Regulations

The major issues which were the focus of the comments submitted concerned the use of the "disparity" standard as the initial determinant of qualification of a State equalization program, the absence of a qualifying standard more specifically addressed to the purposes of so-called "power equalizing" programs, the exclusion of expenditures or revenues from capital outlays and debt service from "disparity" determinations, and the lack of definitiveness in the criteria set forth for in-depth examinations of State

programs not meeting the initial standards. Those who objected to the use of a "disparity" standard generally did so on the grounds that it was beyond the scope of the statutory amendments and too restrictive. As discussed below in response to the specific comments, it is clear that the Commissioner is required to develop an evaluative standard for selecting qualifying programs and that considerations of disparities between expenditures levels is one of several recognized equalization measures. While the standard is somewhat restrictive, it was established because of Congressional intent that the statutory amendment was to provide a narrow exception to the basic prohibition against taking Pub. L. 81-874 payments into consideration in the distribution of State aid to school districts. Through public comment, it has been advocated that the Commissioner adopt a "fiscal neutrality" standard which recognizes the so-called "power equalizing" programs. As discussed below, there is not sufficient information on the appropriateness of such a standard for this regulation to permit a positive response to that comment. The exclusion of expenditures for capital outlays and debt service is based on the random and fluctuating effect those expenditures would have on an evaluation of equalization and the fact that Pub. L. 81-874 is focused on maintenance and operation expenditures. While the evaluative criteria set forth in § 115.62(c)(3) for an "in-depth" examination of a State's equalization program are not capable of being reduced to numerical absolutes, they do provide a relative framework within which a determination can be made and are based on evaluative considerations utilized by experts in the field of school finance equalization. The above comments as well as others of a more technical nature which were submitted to the Office of Education are discussed below on an individual basis. After the summary of each comment, a response is set forth stating changes which have been made to the regulations in light of the

comment, or the reasons why no change is deemed necessary. The comments are in order of general comments followed by those related to particular sections of the interim regulations.

1. *Comment*. Two commenters expressed general opposition to the exception to the general prohibition against consideration of Pub. L. 81-874 payments in allocation of State aid provided by section 5(d)(2) of Pub. L. 81-874 (Section 5(d)(3) of the Act for Fiscal Year 1975), while three commenters expressed general approval of the provision.

Response. No change has been made in the regulations in response to the comments. The Commissioner takes note of these views and makes them known to the public. However, the purpose of this rulemaking is to implement the amendment as enacted by Congress, not to alter or question its scope or purpose. It would be beyond the authority of the Commissioner to decline to implement the amendment as mandated by the Congress.

2. *Comment*. One commenter requested that the regulations be amended to prohibit the use of Pub. L. 81-874 payments under the authority of the amendment to section 5(d) of the Act to supplant State equalization aid, which otherwise would have been apportioned to eligible applicants. Under this proposal, a State would be required to redistribute to all local educational agencies, through its State aid program, those funds which would have been made available through the program, but for the offsetting of Pub. L. 81-874 payments.

Response. No change has been made in the regulation. Such a requirement would exceed the rulemaking authority of the Commissioner. That limitation would have been incorporated into the statute if Congress had intended it, since

it would have far-reaching consequences for State aid programs. Furthermore, this additional requirement would defeat the plain language of the original section 5(d) and the amendment to it. Section 5(d)(1) of Pub. L. 81-874 (section 5(d)(2) for Fiscal Year 1975) establishes a general supplanting prohibition to which the exception was provided by the legislative amendment on which these regulations are based. The amendment permits divergency from the general prohibition only under well-defined and carefully controlled circumstances, as set forth in these regulations. Not to allow any divergence would defeat the legislative purpose and would interfere with a State's right to choose the level of funding for this State aid program. On the other hand, a State is not precluded from taking the suggested action and it would improve its equalization posture by redistributing the offset funds.

3. *Comment.* Three commenters asked that the regulations be amended to provide a "grandfather clause," through Fiscal Year 1976, for those States to which the so-called "waiver" of section 5(d)(2) of Pub. L. 81-874 under section 11 of Pub. L. 93-150 (School Lunch Act of 1973) was applicable during Fiscal Year 1974. This would effectively excuse those States from noncompliance with these regulations and the statute prior to Fiscal Year 1977.

Response. No change has been made in the regulation. Such an amendment to the regulation would be beyond the rule-making authority of the Commissioner. The Commissioner is aware of the administrative difficulties and financial burdens which may be placed on the States and local educational agencies attendant to an application of this regulation during the period in question. However in order to exclude the application of the regulation, it would be necessary to overcome the statutory intent that the prohibition

against State offsetting of Pub. L. 81-874 funds be effective except for those programs which meet the qualifications under the Commissioner's regulations. This can only be done by legislation.

4. *Comment*. Three commenters expressed the opinion that Pub. L. 81-874 payments received by a local educational agency on the basis of children who reside on Indian trust lands should not be subject to the operation of the amendment to section 5(d) of that Act on the grounds that they are "categorical" funds, and that the regulation should be amended accordingly.

Response. No change has been made in the regulation. The inclusion of such a provision in the regulation would exceed the rulemaking authority of the Commissioner. There is nothing in the basic statute, the amending legislation, or the legislative history which reflects any Congressional intent that these funds are to be treated as "categorical" in nature or to be excluded from the operation of the amendment. On the contrary, it is clear that they are to be considered as another type of so-called "A" payment. Where Congress has sought to treat certain payments under Pub. L. 81-874 as "categorical" in nature, such as for handicapped children of uniformed services personnel, it has specifically prescribed the uses to which these funds must be put. This has not been done for the payments attributable to children residing on Indian trust lands. This is not to say that the Federal government is unconcerned with the education provided Indian children in these schools. Congress has focused upon the special relationship local educational agencies receiving funds under the Act may have with Indian children, who constitute the vast majority of children residing on Indian lands. In section 5(a)(2) of Pub. L. 81-874, it has been specifically provided that applicants which receive payments

based on children who reside on Indian lands "shall set forth adequate assurance that Indian children will participate on an equitable basis in the school program of the local educational agency." Furthermore, through regulations set forth in 45 CFR 115.14(b), the Commissioner has required that local educational agencies receiving these payments must provide for the participation of the parents of Indian children in the planning and development of educational programs and projects serving these children. Similarly, it is to be noted that Federal financial assistance provided under Pub. L. 81-874 is subject to the provisions of Title IV of the Civil Rights Act of 1964. Thus, it is felt that there is legal protection provided in existing law with respect to the educational rights of Indian children who may be the basis of payments received under Pub. L. 81-874. Moreover, it has been noted that during Congressional debate over the adoption of the amendment to section 5(d), Senator Domenici (New Mexico) raised concerns about the effect the amendment would have on school districts serving Indian lands. It would appear that his concern was based on the assumption that payments based on children residing on Indian lands would be subject to the effect of the amendment. Nothing was said in response to his statement. Without a Congressional enactment specifically excluding payments attributable to these children from the general operation of Pub. L. 81-874, the Commissioner cannot go beyond the existing legal framework of assurances and special provisions.

5. Section 115.61(b) *General rules*.

Comment. Three commenters objected to the general rule set forth in § 115.61(b)(2) of the regulation which excludes from qualifications for the exception provided in section 5(d) of the Act any program of State aid which has been finally determined by a State court to fail to equalize expenditures for

free public education among local educational agencies within the State or otherwise violates law. The commenters expressed the view that the provision was too broad, in that it failed to distinguish between rulings that might be based on issues other than equalization and those that are so based, and that the provision was not reasonably related to the purpose of the regulation. Furthermore, it was stated that, if the provision were to remain in the interim regulation, it should be amended to provide that any State system of school finance which has withstood a challenge in court should be deemed as qualifying under the regulation.

Response. No change has been made in the regulation. Clearly, if a state system of school finance has been found wanting in either respect by its own State courts it would be unwise for the Commissioner to recognize such a system as a valid program of State aid qualified for the exception implemented by these regulations. Obviously, the program would have to be changed in some respect in order to conform to State requirements, and any determination related to the program would be temporary. The object of this provision is to provide some sore to long-range solution to the problem of Pub. L. 81-874 payments impeding meaningful equalization efforts by States. Determinations of temporary effect would not help in this regard and would add to any confusion about the status of the program of State aid. A State cannot fairly represent its equalization program as valid when its own State courts have found it to be invalid. On the other hand, where a State court has upheld the State school finance system as valid, that court may not have been using the same standards established by this regulation. The Commissioner cannot delegate the responsibility to evaluate programs of State aid as regards their equalization effects to State Judicial officers. The Commissioner must establish national standards for all States desiring to avail themselves

of the exception provided in section 5(d) of Pub. L. 81-874 and apply them uniformly. In refusing to consider programs of State aid which have failed an examination as to their legality of a program in the State courts, the Commissioner is not delegating this responsibility but merely setting forth, as a prerequisite to his examination of these programs, the requirement that the program be valid in its own jurisdiction.

6. Section 115.61(c). *Definitions.*

Comment. One commenter objected to the exclusion of contribution of fund capital in food service in the definition of "revenue" as set forth in § 115.61(d)(4) of the regulation.

Response. No change has been made in the regulation. The definition of "revenue" used in § 115.61(d)(4) is the standard definition of the term as set forth in *Classifications and Standard terminology for Local and State School systems, 1973, Handbook II, Revised* (National Center for Educational Statistics). Contributions of fund capital in food service and pupil activity funds (which are revolving fund or clearing accounts) are excluded as revenues because these contributions represent equity or capital to those funds.

7. Section 115.62. *Qualifying Programs.*

Comment. Three commenters expressed opposition to the establishment of specific standards as set forth in § 115.62(a) and (b) for determining the eligibility of a program of State aid under section 5(d)(3) of the Act. The commenters made the following points: (1) The standards are too restrictive because, at present, only a few States have programs of State aid which will satisfy the standards; (2) The standards are arbitrary and unrelated to the purpose of the statute; and (3) The standards were formulated on the assumption that they

would encourage school finance reform, which is fallacious.

Response. The only change is an increase in the "disparity" standard to 25 percent. The standards set forth in this regulation were developed in light of the statutory language and legislative history of the amendment to section 5(d) of Pub. L. 81-874, which clearly direct the Commissioner to promulgate regulations to define those concepts which serve to evaluate programs which may be granted an exemption from existing prohibition contained in that section of the Act. It is necessary to develop specific and uniform standards in order to fulfill that mandate. Any standard which establishes a minimum level of acceptance has the obvious effect of excluding those programs which do not come up to that level. To alleviate any inequitable results of this approach, the Commissioner has specifically provided in § 115.62(c) for further detailed consideration of programs which may not meet the requirements of the "disparity" test in § 115.62(b). The standards are not arbitrary in the sense of being unreasonable. A "disparity" standard of 25 percent is actually less stringent than the expenditure ranges recommended in some school finance literature and by recent major studies of school finance equity. Furthermore, a view that these standards are unrelated to the purpose of the statute is not accepted. A disparity standard was chosen because it is a method of evaluating school finance programs in terms of equalization that has been commonly used both by the courts and authorities in the field of school finance, and because it is believed that the phrase "equalize expenditures" focuses upon the relative amounts of funds available to local educational agencies for educating the children within their school systems. The "disparity" standard was not developed as a tool to force States to undertake school finance reform. This standard was one of the methods of evaluation discussed in the House Committee print "Public Law 874 and State

Equalization Plans," which was incorporated into House Report No. 93-805. In addition, the "disparity" standard was discussed in consultation meetings with States prior to publication of the proposed rule. The general consensus of those meetings was that a "disparity" standard was a legal and reasonable test under these provisions. As stated in § 115.60(b) of these regulations, the purpose of establishing these standards is limited to evaluating programs of State aid in order to determine when consideration by States of Pub. L. 81-874 payments in the distribution of State aid would be appropriate.

Comment. One commenter expressed the opinion that § 115.62 should be amended to add an alternative qualifying test which would recognize the principle of fiscal neutrality. This principle is that the availability of financial resources for education in a school district should not depend on the wealth of that district but that of the State as a whole. In other words, the State, through a program of State aid, will offset the lack of wealth available for the support of education in a school district so that the amount of expenditures for education is not governed by the amount of available local wealth.

Response. No change has been made in the regulation. However, after extended consideration of the advisability of the suggested amendment, the Commissioner has decided to publish a notice of proposed rulemaking incorporating the principle of fiscal neutrality. This is being published simultaneously with this regulation. It would be improper to make a change of this nature in the interim regulation without prior notice and opportunity for public comment. On the other hand, to withhold publication of the interim regulation until a final decision is reached on the proposed rule would unduly delay the effectiveness of the regulation.

Comment. Three commenters proposed that, in lieu of the criteria contained in § 115.62 for qualifying programs, criteria should be developed and applied which would measure the degree of equalization which would pertain if a State were permitted to recognize Pub. L. 81-874 payments as local resources, as compared to the degree of equalization which pertains when it is not permitted.

Response. No change has been made in the regulation. The extent to which equalization is improved by permitting States to consider Pub. L. 81-874 payments as local resources is a relevant consideration in implementing legislation which is concerned with the possible ill effects these payments may have on State equalization efforts. Thus, such a consideration has been made part of the more detailed analysis of State programs set forth in § 115.62(c), which applies when a State program is adjudged not to meet the requirements of the threshold "disparity" test in § 115.62(b). However, to make this the sole test of whether a State has a program sufficiently equalizing to merit the exemption from the prohibition against considering these payments as local resources in the distribution of State aid would contravene the statutory framework within which these regulations must be developed. The statute and its legislative history clearly mandates that the Commissioner develop regulations which will measure the effects of State equalization programs upon all local educational agencies within the State, not the effect of granting the exemption applied for. However, it is within the scope of the Commissioner's administrative discretion in promulgating these regulations to include various equity considerations, of which the suggested amendment is one.

Comment. Regarding the procedure for calculating the "disparity" standard in § 115.62(b), one commenter was not sure whether pupils or school districts are to be considered

when determining the 95th and 5th percentiles, while two commenters advocated that the 95th and 5th percentile exclusions be based on numbers of school districts and not on number of pupils in excluded school districts. A fourth commenter argued that calculating a disparity between school districts would have the effect of minimizing the real school-by-school disparities in States with small numbers of school districts while exposing those disparities in States with large numbers of districts. The commenter offered an alternative scheme of his own design for calculating a measure of fiscal neutrality. The scheme would incorporate into a single index measures of wealth disparity and percentage of local revenues equalized to allow for considerations of fiscal neutrality based programs.

Response. The interim regulation has been rewritten to make it clear that the referenced percentiles are based on number of pupils. Section 115.62(b)(1) provides that in calculating the disparity standard according to procedures set forth in Appendix A, the districts in a State will be ranked on the basis of current expenditures or revenue per pupil, and that those districts which fall about the 95th and below the 5th percentile of those agencies in terms of the number of pupils in attendance in the schools of those agencies will be excluded for purposes of the calculation. The percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts. However, it appears that the proposed regulation may have not been as clearly expressed as desired. In regard to the question of pupils versus districts for the percentiles used in calculating the disparity standard, it is the Commissioner's view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States

with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

The Commissioner agrees with the observation that expenditure disparities are more likely to be exposed in States with large numbers of small districts than in States with relatively few large districts. The commissioner also agrees that school-by-school identification of per pupil expenditure variations would provide a more precise picture of expenditure disparities within a State than would district-by-district comparisons. However, a requirement that expenditure disparities be calculated in such a manner would impose a tremendous data gathering and reporting burden for those States seeking to qualify. The Commissioner feels that the imposition of such a burden would be unfair and administratively unwise. The Commissioner has examined with interest the alternative scheme proposed by the commenter for determining qualifying programs. While the commissioner is not convinced that the proposed scheme should replace the approach as set forth in § 115.62(b) he does see merit in further consideration of the appropriateness of a test of fiscal neutrality as an alternative to the expenditure disparity test. As stated above in paragraph 7, the matter is currently under study.

Comment. One commenter recommended that the procedure for calculating expenditure disparities as set forth in § 115.62(b) be amended to require that expenditures be compared on a basic pupil count basis only and not to permit those comparisons to be make on a weighted pupil or other

unit or pupil need basis.

Response. No change has been made in the regulation. The statutory amendment which this regulation implements clearly requires that any standard used to define the phrase "equalize expenditures" must not be applied in any manner adverse to a program of State aid which provides for taking into consideration the additional cost of providing free education for particular groups or categories of pupils (see section 5(d)(3)(B) of Pub. L. 81-874—section 5(d)(2)(B) of that Act for Fiscal Year 1976 and thereafter). The so-called "weighted" systems of State aid are considered to be a type of program which does take into consideration these additional costs. Therefore, these regulations may not be applied adversely to those systems by dividing their expenditure levels by basic pupil count.

Comment. Two commenters suggested that the disparity standard set forth in § 115.62(b)(1) of this subpart be lowered at 10 percent, while one commenter advocated a 25 percent standard.

Response. The regulation has been changed in response to the latter comment. A "disparity" standard was chosen in order to fulfill Congressional intent that the exception provided by the statutory amendment would be a narrow exception to the general prohibition contained in section 5(d) of Pub. L. 81-874, and that the exception would be applied only under carefully controlled circumstances. It is felt that a 25 percent standard will still accomplish these purposes, whereas 10 percent would prove too restrictive under present circumstances. More specifically, a 25 percent standard will permit a degree of flexibility in the "disparity" standard without diminishing the control presently desired over the quality of State programs subject to approval under these

regulations.

Comment. One commenter expressed concern over the provision contained in § 115.62(b)(3) which requires Federal funds to be included in the computation of the expenditure disparity to the extent that these funds are taken into consideration by a State under a State aid program conforming to the requirements of section 5(d)(3) of the Act (section 5(d)(2) for Fiscal Year 1976 and thereafter). The commenter was concerned that the effect of this provision might be to reflect a higher expenditure disparity in a State than if Federal funds were completely excluded from the calculation.

Response. No change has been made in the regulation. The provision was deemed necessary in order that the Commissioner would know exactly how the State program is designed to operate, with payments under Pub. L. 81-874 being taken into consideration. If by some peculiarity after these payments are taken into consideration in the allowable proportion, there exists a greater than 25 percent disparity caused by the continued consideration of those payments in the calculation, then a State may assert, under the provisions set forth in § 115.62(c), that the application of the 25 percent disparity limitation would be inequitable under the circumstances. On that basis the State still would be eligible for consideration as a qualifying program. It should be understood that not only Pub. L. 81-874 payments but any Federal assistance payments which are taken into consideration by a State in its distribution of State aid are to be included in the calculation.

Comment. One commenter asked if a district cost differential incorporated into his State's school finance program can be excluded under the provisions of

§ 115.62(b)(3).

Response. No change in the regulation is necessary. The language contained in § 115.62(b)(3) specifically encompasses cost-of-living differentials as a class of expenditures for exclusion.

Comment. Five commenters requested that consideration be given to excluding local expenditures for the purpose of meeting additional costs associated with conditions of sparsity when applying the disparity standard as required by § 115.62(b)(3).

Response. No change has been made in the regulation. To the extent that the program of State aid specifically recognizes the additional costs associated with either sparsity or density of student population, § 115.62(b)(3) allows for consideration of that additional cost factor. It is recognized by the Office of Education that many districts in the Nation face substantial additional costs due to conditions of sparsity as well as to a variety of other conditions. For purposes of applying the disparity standard, a program of State aid includes not only those State contributions as defined in § 115.61(c)(1), but all local revenues equalized by the State in accordance with the standards set forth in § 115.62(b)(3). Local revenues equalized by a State program become an integral part of that program and cannot be reasonably distinguished. To allow the exclusion of certain unequalized expenditures at the local level because they were made for reasonable purposes (such as to meet additional costs associated with conditions of sparsity) would be to effectively allow the exclusion of all local unequalized expenditures in computing the expenditure disparity. While almost any local expenditure which acts to widen the expenditure disparity within a State may be defended on some basis of rationality,

where the State itself has not recognized the appropriateness of such an expenditure with respect to this own equalization program, it is felt that a presumption cannot lie in favor of the expenditure variance's being appropriate. However, under the provisions of § 115.62(c), a State could present evidence to justify the Commissioner's consideration of certain variances in disparities as attributable to sparsity factors other than those reflected in the program of State aid.

Comment. One commenter maintained that only revenue can be used in calculating the disparity standard as set forth in § 115.62(b), because school expenditures are not reported by specific sources of funds except in certain categorical programs and one could not identify expenditures which should be excluded.

Response. No change has been made in the regulation. Most States and local educational agencies commonly account for expenditures in such a manner as to permit the identification of categorical funds and their exclusion (except when taken into consideration in the program of State aid) for the calculation of expenditure disparities under § 115.62(b)(3).

Comment. Four commenters questioned the exclusion of expenditures or revenues for capital outlays and debt service in the calculation of the disparity standard set forth in § 115.62(b) and in the computation of the maximum proportion for consideration of Pub. L. 81-874 payments as local resources set forth in § 115.62(b).

Response. No change has been made in the regulation. The exclusion is based on the fact that Pub. L. 81-874 is a current expenditure program and, as a consequence, it would be inconsistent to incorporate into tests of program

qualification and into procedures for program operation measures of classes of expenditures which are unrelated to the purposes of the program in question. Additionally, expenditures for capital outlays and debt service are likely to fluctuate considerably from year to year and might act unfairly in the application of the disparity standard or any other uniform measure of current expenditure equity.

Comment. Three commenters objected to the exception clause as set forth in § 115.62(c) of this subpart on the ground that it does not include definitive criteria which will permit case-by-case judgments. In addition, the commenters objected to the inclusion of the evaluation criteria contained in § 115.62(c)(2)(v) of this subpart on the grounds that it is irrelevant to the issue to which the regulations are addressed.

Response. No changes has been made in the regulation. The commenters are correct in pointing out that the criteria established in § 115.62(c)(2) of this subpart are set forth in general language and are not defined in terms of mathematical measures. The intention of the exception clause is, in fact, to provide relief from precise mathematical evaluation if a State can demonstrate that such an evaluation applies unfairly. Because adjectives such as "predominantly," "adequately," and "substantial," are not provided with mathematical definitions in the regulation does not mean that these terms carry no meaning and cannot be reasonably applied.

The evaluation criteria contained in § 115.62(c)(2)(v) of this subpart is a commonly accepted characteristic of a sound plan to State school aid and is not irrelevant to the issue of the equity of a school finance system.

8. Section 115.62 *Proportion of Pub. L. 81-874 funds that may be taken into consideration.*

Comment. One commenter requested special consideration for his school district in the computation of proportion as set forth in § 115.63(b) because of his claim that the State failed to adequately recognize in its school aid program certain additional costs which must be met by the district.

Response. No change in the regulation is possible. The Commissioner cannot, by regulation, give special consideration to a particular local educational agency. It is not clear from the comment submitted what the exact basis is for the commenter's complaint. However, any local educational agency which feels that it is aggrieved by a determination under this regulation with regard to the program of State aid affecting it may request a hearing in accordance with the provisions of § 115.66 of this regulation.

Comment. One commenter asked if cash balances and indirect costs can be counted as local revenues in the computation of proportion as set forth in § 115.63(b).

Response. No change in the regulation is necessary. Only revenues earned in the current year will be counted as revenues. Indirect costs are not revenues but a classification of expenditure and, as such, cannot be counted as a revenue. Of course, revenues expended by a school district to meet costs which might be classified as indirect costs can be counted.

Comment. One commenter requested that a § 115.63(c)(1), which requires that only those revenues produced within the boundaries of a local educational agency can be counted in determining the proportion calculation, be amended to include revenues received from intermediate school districts or county units.

Response. The regulation has been changed in response to the comment. It was not intended that revenues received from intermediate school districts or from county units be excluded from consideration as local revenue in the proportionality calculation. Accordingly, the regulation has been rewritten by adding a subparagraph (3) to § 115.63(c) to clearly establish that revenues received by a local educational agency which are produced within the boundaries of an intermediate school district or local governmental instrumentally will be counted as local revenues.

Comment. One commenter requested that § 115.63(d)(1) be amended to permit a State to apply only a part of the proportion calculated if it so desires.

Response. No change in the regulation is necessary. Nothing in Pub. L. 81-874 or in this regulation would preclude a State from counting payments under the Act as local resources in a proportion less than the maximum permitted under the statutory and regulatory provisions.

9. Section 115.64. *Assurances*.

Comment. One commenter recommended that § 115.64(a)(b) be amended to require consultation by the applicant agency and the State educational agency prior to the submission of the assurances required under this section.

Response. No change has been made in the regulation. While the recommendation has practical merit in avoiding confusion as to the actions of the State with respect to local educational agencies (applicants under the program), the Commissioner does not feel that it is necessary to mandate consultation between State and local agencies. A local educational agency should know whether Pub. L. 81-874

payments are being taken into consideration by its State in the distribution of State aid and, if so, whether the State is doing so in the allowable proportion. If an applicant agency cannot in good faith submit an assurance under the provisions of § 115.64(a) because the State educational agency has failed to provide the applicant with the necessary information or for any other reason, then the applicant agency should not submit such an assurance. Failure to submit such an assurance will constitute sufficient cause for an initiation of proceedings by the Commissioner as provided for in § 115.64(d). However, failure to submit the assurance will not result in the suspension or termination of payments to the applicant agency prior to a final decision under this regulation.

10. Section 115.65 *Submissions and consultations.*

Comment. One commenter said that the purposes of the Act would be better served if a determination under the provisions of § 115.65 were made prior to permitting a State to take into account payments under Title I of Pub. L. 81-874.

Response. No change has been made in the regulation. It is felt that State governments will seek to comply with the statute and regulation. Opportunity is provided in § 115.65(c) for advance consultation for States concerned about the eligibility of a State aid program. Under § 115.66(h), provision is made for restoration of State aid payments to local educational agencies if the State program is determined not to qualify.

Comment. Three commenters suggested that § 115.65 be amended to permit a judgment to be made on the school aid information for the most recently completed fiscal year which is of binding application for the subsequent fiscal year.

Response. No change in the regulation is necessary. The acceptability of data rules contained in § 115.62(b)(5) will be applied in making judgments on the basis of the best available data. If school aid information favored by the commenters is the best available data in a particular case, that will be the data used in reaching a final determination.

11. Section 115.66 *Notice and opportunity for hearing*.

Comment. One commenter suggested that school districts be given the same notice and opportunity for hearings as the State under the provisions of § 115.66.

Response. No change in the regulation is necessary. Section 115.66 does provide school districts the same notice and opportunity for hearings as the State educational agency.

C. OTHER CHANGES

1. A number of typographical and technical corrections have been made.

2. Words importing the masculine gender have been deleted.

3. Section 115.62(c)(1)(ii) has been amended to provide that expenditures among local educational agencies in a State must be "more" equalized as a result of taking Pub. L. 81-874 payments into consideration in order for a State to seek qualification for its program of State aid on the basis of equity criteria. The proposed regulation had provided that expenditures would not be "less" equalized. Unless expenditures are more equalized by such State action it cannot be said fairly that Pub. L. 81-874 payments represent and impediment to equalization. A determination as to whether

expenditures will be more equalized can be made according to any generally accepted and appropriate statistical method for calculating comparative distribution around the State mean per pupil expenditure.

4. A new subparagraph (2) has been added to § 115.65(a) to require that, whenever a State or local educational agency shall petition the Commissioner for a determination under the provisions of that section, a State shall notify all local educational agencies receiving payments under Pub. L. 81-874 of its petition, and a local educational agency submitting a petition for determination shall notify the State of its action. Both parties will be accorded the right of intervention in the initial determination proceedings. This was done so that all parties possibly affected would have notice of the pending determination and have an opportunity for input into the initial determination procedure. The former subparagraph (2) has been renumbered subparagraph (3).

5. Section 115.65(b)(4) has been amended to provide that, in any hearing proceeding initiated by any party under this part, the commissioner may request from the States data necessary for reaching a determination. The proposed rule had provided only for those proceedings initiated by the Commissioner.

D. ADOPTION OF REGULATION

After consideration of all comments, the Commissioner hereby adopts the proposed regulation which was published in the FEDERAL REGISTER on May 1, 1975 with the changes noted above as interim regulations as set forth below.

Effective date: Pursuant to section 431(d) of the General Education Provisions Act, as amended (20 U.S.C. 1232(d)),

these regulations have been transmitted to the Congress concurrently with the publication of this document in the FEDERAL REGISTER. That section provides that regulations subject thereto shall become effective on the forty-fifth day following the date of such transmission, subject to the provisions therein concerning Congressional action.

(Catalog of Federal Domestic Assistance No. 13,478—School Assistance in Federally Affected Areas—Maintenance and Operations.)

Dated: March 29, 1976.

T.H. BELL,
U.S. Commissioner of Education

Approved: June 8, 1976
DAVID MATHEWS,
Secretary of Health, Education, and Welfare

Title 45 of the Code of Federal Regulations is amended by adding a new Subpart G to Part 115 to read as follows:

Subpart G—Determinations Under Section 5(d)(1) and (2)

Sec.

115.60 Scope and purpose.
115.61 Programs of State aid designed to equalize expenditures.
115.62 Qualifying programs.
115.63 Proportion in which funds under the Act may be taken into consideration.
115.64 Assurances.
115.65 Submission and consultation.

115.66 Notice and opportunity for hearing.

APPENDIX A

Subpart G—Determination Under Section 5(d)(1) and (2)

§ 115.60 Scope and Purpose.

(a) *Scope*. This subpart applies to determinations pursuant to sections 5(d)(2) and (3) of the Act as amended by Pub. L. 93-380. For fiscal years prior to fiscal year 1976, references to section 5(d)(1) are to section 5(d)(2) and references to section 5(d)(2) are to section 5(d)(3).

(b) *Purpose*. The sole purpose of the regulations in this subpart is to implement the provisions of section 5(d)(2) of the Act. The definitions and standards contained herein have been developed with respect to the particular intent of the amendment made to section 5(d) of the Act by sections 304(c) and 305(a)(2) of Pub. L. 93-380 and should not be construed as establishing definitions and standards for any other purpose.

(20 U.S.C. 240(d); secs. 304(c), 305(a)(2), Pub. L. 93-380, 88 Stat. 484; 120 Cong. Rec. S8505, 8507 (daily ed. May 20, 1974))

§ 115.61 Programs of State aid designed to equalize expenditures.

(a) *Statutory Provisions*.

(1) Section 5(d)(1) of the Act provides that, except as provided in section 5(d)(2), no payment s may be made to any local educational agency within a State which takes into

consideration payments under section 5 of the Act in determining the eligibility of such agency for State aid, or the amount of such aid, with respect to free public education during the fiscal year of such payments or the preceding fiscal year, or which makes aid available in such a manner as to result in less State aid to such agency which is eligible for payments under the Act than such agency would receive if it were not so eligible.

(2) Section 5(d)(2) of the Act provides that, notwithstanding section 5(d)(1), if a State has in effect a program of State aid for free public education for any fiscal year, which is designed to equalize expenditures for free public education among the local educational agencies of that State, payments under the Act may be taken into consideration by such State in determining (i) the relative financial resources available to local educational agencies in that State and (ii) the relative financial need of such agencies for the provision of free public education for children served by such agencies, subject to the provisions in such section.

(20 U.S.C. 240(d); secs. 304(c), 305(a)(2), Pub. L. 93-380, 88 Stat. 484)

(b) *General Rules.* (1) Except as provided in subparagraph (b)(2) of this section, a State may take into consideration payments under the Act in making the determinations described in paragraph (a)(2) of this section if such State has a program of State aid which qualifies under § 115.62 except that such payments may be taken into consideration for each affected local educational agency only in the proportion described in § 115.63.

(2) No program of State aid may qualify under this subpart if a court of that State has determined by final

order, not under appeal, that such program fails to equalize expenditures for free public education among local educational agencies within the State or otherwise violates law.

(c) *Data for determinations.* Determinations under this subpart may be made: (i) On the basis of data for the fiscal year preceding the fiscal year of determination if the same program was then in effect; or (ii) On the basis of estimates of data for the fiscal year of determination. Data submitted shall be the most currently available and complete data whether based on revenues or current expenditures. Estimates submitted by a State educational agency or other appropriate State agency shall set forth the assumption upon which such estimates are founded, shall be accompanied by an assurance as to their accuracy, and shall be adjusted by actual data for the fiscal year of determination as soon as available for the purpose of verification.

(d) *Definitions.* For the purposes of this subpart, the following terms shall have the meanings indicated below:

(1) "State aid" means any contribution, no repayment for which is expected, which is made by a State to or on behalf of local educational agencies within the State for current expenditures in the provision of free public education;

(2) "Equalize expenditures" means to meet the standards set forth in § 115.62;

(3) "Current expenditures" means the total charges incurred for the benefit of the school year, exclusive of capital outlay and debt service for capital outlay;

(4) "Revenue" means an addition to assets which does

not increase any liability, does not represent the recovery of an expenditure, does not represent the cancellation of certain liabilities without a corresponding increase in other liabilities or a decrease in assets, and does not represent a contribution of fund capital in food service or pupil activity funds.

(20 U.S.C. 240(d)(2))

§ 115.62 Qualifying programs.

(a) *General standard.* A program of State aid shall be deemed to be a program of State aid for free public education which is designed to equalize expenditures for free public education among local educational agencies in that State within the meaning of section 5(d)(2) of the Act and this subpart if such program—

(1) Is authorized by State law in effect for the fiscal year for which the determination under this subpart is made;

(2) of the Act and this subpart if such State aid among local educational agencies in the State to order to carry out the objectives of such program;

(3) Provides that in determining the amount to be apportioned to each local educational agency in the State, the State will take into consideration the relative financial resources available to local educational agencies in that State for such program; and

(4) Meets the standard of paragraphs (b) or (c) of this section.

Under the provisions of this section, the term "equalize expenditures" shall not be construed in any manner adverse

to a program of State aid for free public education which provides for taking into consideration the additional cost of providing free public education for particular groups or categories of pupils in meeting the special educational needs of such children as handicapped children, economically disadvantaged, those who need bilingual education, and gifted and talented children.

(b) *Disparity Standard.* (1) Except as provided in paragraph (c) of this section, a program of State aid described in paragraph (a) of this section shall be deemed to qualify under this section if, for the fiscal year for which the determination "under this subpart is made, the disparity in the amount of current expenditures or revenue per pupil for free public education among local educational agencies having similar grade levels in the State is no more than 25 per cent, as determined according to the procedures set forth in Appendix A of this subpart.

(2) For the purposes of this paragraph, the term current expenditures or revenue per pupil shall be computed on the basis of the total number of pupils in the public schools of the local educational agencies of the State (determined by whatever standard measurement of pupil count is used in such State).

(3) If a program of State aid subject to a determination under this subpart uses a "weighted" pupil or other unit of pupil need in determining allocations of State aid in order to reflect the cost differentials associated with pupils having special educational needs (such as handicapped children, economically disadvantaged children, those in need of bilingual education, and gifted and talented children) and cost differentials associated with sparsity or density of population, cost of living, or special

socioeconomic characteristics, computations under this paragraph may be made on the basis of such "weighted" pupils or other units of pupil need. In computing current expenditures or revenue per pupil for all programs other than those described in the preceding sentence, such computation shall include all revenues for education from State and local sources applied or contributed for current expenditures in local educational funds for which such local educational agencies have no obligation to account to the Federal government for the particular use thereof, but such computation shall identify and then exclude those State and equalized local funds applied or contributed outside a program of State aid subject to this subpart for the free public education of children in need of special education services, such as those referenced in the preceding sentence. Federal funds shall be included in computing current expenditures or revenue per pupil only to the extent that such funds would be actually taken into consideration by a State under a State aid program conforming to the requirements of section 5(d)(2)(A)(ii) of the Act and § 115.63 of this subpart.

(c) *Exception in case of programs not qualifying under paragraph (b)* of this section (1) A State program which does not meet the requirements of paragraph (b) of this section may, nevertheless, qualify under this section if the Commissioner determines on the basis of information submitted by the State, that (i) a decision not to apply the exact disparity standard specified in paragraph (b) of this section to the program submitted by the State would be justifiable because of exceptional circumstances within the State related to disparities in current expenditures or revenue per pupil for education, (ii) current expenditures or revenues for education in such State will be more equalized if payments under the Act are taken into consideration under this subpart

than if they are not, and (iii) the program meets the requirements of paragraph (c)(3) of this section.

(2) For purposes of paragraph (c)(1)(ii) of this section, current expenditures or revenues for education within a State shall be deemed to be "more equalized" if the distribution around the mean per pupil expenditure for all local educational agencies within the State is less when payments under the Act are taken into consideration in conformity with § 115.63 of this part than when they are not, as calculated according to accepted statistical methods appropriate to the circumstances.

(3) A program of State aid considered under this paragraph shall not be determined to be a program designed to equalize expenditures among local educational agencies in the State unless the Commissioner finds that, in addition to meeting the requirements of the preceding subparagraphs —

(i) The amount of the revenue available to local educational agencies in the State is not predominantly a function of the wealth of individual local educational agencies;

(ii) Such program is designed to ensure the provision of financially adequate educational programs and supportive services for every pupil in the State who is enrolled in public schools;

(iii) In the determination of the relative financial need of local educational agencies, such program (*a*) makes provision for identifying those pupils with special educational needs (such as handicapped children, economically disadvantaged children,

children with limited English-speaking ability); (*b*) takes into consideration the additional costs of providing free public education for such children or categories of children; and (*c*) takes into consideration the costs of providing education which might be associated with such factors as sparsity or density of population, cost of living, and socio-economic characteristics of the local educational agencies; except that nothing in this clause shall be construed to require any particular system of weighting of pupils.

(iv) Such program involves a substantial percentage of school revenues;

(v) Such program is designed to provide systems and procedures for evaluating the degree to which the program is achieving its stated objectives.

(20 U.S.C. 240(d)(2); S. Rep. No. 763, 93d Cong., 2d Sess. 56 (1974); 102 Cong. Rec. S 8604-8607 (daily ed., May 20, 1974); *Id.*, H 7401 (daily ed., July 31, 1974); Congressional Research Service, *Public Law 874 and State Equalization Plans* 30-34 (H.R. Comm. On Education and Labor Print (March 1974))

§ 115.63 Proportion in which funds under the Act my be taken into consideration.

(a) *Provision of law.* Section 5(d)(3)(A)(ii) of the Act provides that a State may consider as local resources funds received under the Act only in proportion to-he share that local revenues covered under a State equalization program are of total local revenues. Such determinations of proportionality shall be made on a case-by-case, school district by school district basis, for each local educational

agency affected and not on the basis of a general rule to be applied throughout a State.

(20 U.S.C. 240(d)(2)(A)(ii); S. Rep. No. 1026, 93d cong., 2d Sess., 163)

(b) *Computation of proportion.* In computing the share that local revenues covered under a State equalization program are of total local revenues for a local educational agency with respect to a program qualifying under § 115.62, the proportion shall be obtained by dividing (1) the amount of local revenues covered under the equalization program by (2) the total local revenues attributable to current expenditures for free public education within such agency.

(c) *Local revenues.* For the purposes of this section —

(1) "Local revenues covered under a State equalization program" means those revenues for current expenditures produced within the boundaries of a local educational agency contributed to or taken into consideration in a program of State aid subject to a determination under this subpart, excluding all revenues from State and Federal sources.

(2) "Total local revenues" means all revenues for current expenditures of a local educational agency, including revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question but excluding all revenues from State and Federal sources.

(3) Revenues received by a local educational agency which are produced within the boundaries of an intermediate school district or other local governmental

instrumentality will be counted as local revenues.

(d) *Application of proportion to payments under the Act.* (1) The proportion established under this section (or a lesser proportion) for any local educational agency receiving payments under the Act may be applied by a State to actual receipts of such payments or to the prorated entitlements provided for under section 5 of the Act and § 115.24 of this part, subject to any further requirements of this subpart and other law.

(2) Such proportion may not by applied to any portion of a payment under the Act made to a local educational agency on the basis of low-rent housing pupils or handicapped children of uniformed services personnel after fiscal year 1975.

(20 U.S.C. 240(d)(2); 102 Cong. Rec. H7412(daily ed., July 31, 1974))

§ 115.64 Assurances.

(a) *By applicants.* Each applicant for financial assistance under the Act shall set forth an assurance in its application either (1) that the State in which it is situated is not taking payments to such applicant under the Act into consideration with regard to a program of State aid, or (2) that, if such State is taking such payments into consideration with regard to its program of State aid, the State is doing so, for such applicant, in conformity with § 115.63 of this subpart.

(b) *By State educational agencies.* Each State educational agency which certifies an application for financial assistance under the Act, as provided for in § 115.10 of this part, shall submit to the Commissioner an assurance with such

application either (1) that such State is not taking payments under the Act into consideration with regard to a program of State aid, or (2) that such State is taking such payments into consideration with regard to a program of State aid in conformity with section 5(d)(2) of the Act and this subpart.

(c) *State guarantee of payments.* Any State which does take payments under the Act into consideration with regard to its program of State aid shall submit an adequate assurance with every application that it certifies for financial assistance under the Act in accordance with § 115.10 of this part, that the State will pay to any local educational agency whose payments under the Act have been or will be taken into consideration with regard to such program, the full amount of such payments taken into consideration but not in fact received by such agency by the time of final payment under the Act for the fiscal year of determination. Such assurance shall also constitute a part of any submission for determination made by a State under § 115.65 of this subpart.

(d) *Failure to provide assurances.* A failure on the part of any local or State educational agency to set forth the assurances required by this section shall constitute sufficient cause for an initiation of proceedings by the Commissioner, as provided for in § 115.65 of this subpart, but shall not result in a suspension or termination of payments under the Act with respect to such agencies prior to the rendering of a final decision under this subpart.

(20 U.S.C. 240(d); S. Rep. No. 1026, 93d Cong., 2d Sess. 163 (1974))

§ 115.65 Submission and consultation.

(a) *Initiation.* (1) A proceeding under this subpart leading

to a determination by the Commissioner as to whether, or the extent to which a State may take into consideration payments under the Act in determining relative financial resources or need under a program of State aid may be initiated (i) by the State educational agency or other appropriate agency of the State; (ii) by a local educational agency which is or would be adversely affected by such taking into consideration; or (iii) by the Commissioner, if the Commissioner has reason to believe that such taking into consideration is in violation of section 5(d) of the Act and that payments to local educational agencies in the State should therefore be terminated under section 5(d) of the Act.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to all State and local agencies which might be adversely affected by a determination. Such agencies will be accorded a right of intervention in the determination proceedings.

(3) Nothing in this subpart shall be construed to prohibit a State which has not obtained a prior determination from the Commissioner under this subpart from taking into consideration payments under the Act as provided for in section 5(d)(2) of the Act if such action is in conformity with §§ 115.62 and 115.63 of this subpart.

(20 U.S.C. 240(d)(2); H.R. Rep. No. 805, 93d Cong., 2d Sess. 42-43 (1974))

(b) *Submission.* (1) A submission by a State or local educational agency under this section shall be made upon such forms as may be furnished by the Commissioner containing such information and assurances as may be required in order to carry out his functions under the Act and this subpart.

(2) A State educational agency in any such submission shall (i) demonstrate how its program of State aid comports with the criteria and standards in § 115.62 and (ii) indicate for each local educational agency receiving funds under the Act the proportion of such funds which will be taken into consideration in accordance with § 115.63.

(3) A local educational agency shall in such submission demonstrate how it is affected by the action of the State which is the subject of such submission and the applicability of the standards set forth in this subpart to such action.

(4) Whenever a proceeding is initiated under this subpart, the Commissioner may request from a State the data deemed necessary to make a determination under this subpart. A failure on the part of a State to comply with such request within a reasonable period of time shall result in a summary determination by the Commissioner that the program of State aid of such State does not comport with the regulations under this subpart.

(c) *Advance consultation.* States shall be afforded an opportunity upon request to consult with the Office of Education regarding the possible application of the requirements of this subpart to relevant proposed legislation (such as legislation providing for taking into account funds under the Act in determining the amount of State aid) prior to the adoption of such legislation.

(20 U.S.C. 240(d))

§ 115.66 Notice and opportunity for hearing.

(a) *General requirements.* Reasonable notice of a determination under this subpart and opportunity for a hearing with respect thereto shall be afforded any State educational agency or local educational agency adversely affected by such determination. Such notice and opportunity shall be afforded, and such hearing (if requested) shall take place prior to the implementation by the Commissioner of any such determination. Such notice shall set forth the reasons for the determination in sufficient detail to enable such agencies to respond.

(b) *Requests for hearing.* (1) A State or local educational agency which is adversely affected by a determination under section 5(d) of the Act and this subpart and which desires a hearing regarding such determination shall submit a written request for such a hearing within 30 days after appropriate notice to such agency. The time within which such a request must be filed will not be extended unless the time for filing such request is extended in writing by the Commissioner or the Commissioner's designee at the time notice of the determination is given.

(2) A request for a hearing in accordance with this section must specify the issues of fact and law to be considered. Where the requesting party is not a State educational agency, a copy of such request shall be furnished to the appropriate State educational agency by such party.

(c) *Time and place of hearing.* The hearing shall be held at a time and place fixed by the Commissioner or the Commissioner's designee (with due regard to the mutual convenience of the parties).

(d) *Counsel.* In all proceedings under this section, all

parties shall have the right to be represented by counsel.

(e) *Proceedings.* The Commissioner may refer the matter in controversy to a hearing officer or to a hearing panel designated by the Commissioner for such purpose. Such hearing officers or hearing panel may consist of or include persons who are employees of the Department, employees of other Federal departments and agencies, and persons who are not such employees.

(f) *Procedural rules.* (1) If in the opinion of the hearing officer or panel no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing officer or panel shall take appropriate steps to afford each party to the proceeding an opportunity for presenting his case at the option of the hearing officer or panel (i) in whole or in part in writing or (ii) in an informal conference which shall afford each party sufficient notice of the issues to be considered (where such notice has not previously been afforded).

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the hearing officer or panel shall afford each party, in addition to the notice of issues required by paragraph (f)(1)(ii) of this section, the following:

(i) An opportunity for a record of the proceedings;

(ii) An opportunity to present witnesses on the party's behalf; and

(iii) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(g) *Decisions.* When a hearing officer or panel is designated to consider the matter, such officer or panel shall make an initial decision based upon written findings, which shall be forwarded to the Commissioner, who may, by appropriate notification to the parties, determine to review it or certify it as the final decision of the Commissioner without further proceedings. Written notice of the initial decision shall be sent to all parties. In any case in which the Commissioner modifies or revises the initial decision, such action shall be accompanied by a written statement of the grounds for such reversal or modification. Notice of the final decision of the Commissioner shall be served upon all parties to the hearing, the hearing panel and any local educational agency which may be adversely affected thereby.

(h) *Effect on payments.* (1) Subject to the provisions of subparagraph (a) when an appropriate request for a hearing under this section has been made, payments to a local educational agency under the Act shall not be reduced or terminated by the Commissioner by virtue of the operation of section 5(d)(1) of the Act until a final decision with respect to the matter in controversy has been made under this subpart.

(2) If a State has been finally determined, after notice and opportunity for hearing, to have been taking into consideration payments under the Act with respect to a program of State aid in violation of sections 5(d)(1) and (2) of that Act, the Commissioner shall terminate payments under the Act to all local educational agencies in that State unless such State agency provides satisfactory assurances that it will restore to all affected local agencies all amounts which were taken into account in determining State aid for such agencies in excess of the amount permitted under sections 5(d)(1) and (2) of the Act and that it will thereafter take into account only such amounts

as are permitted under the Act and this subpart.

(20 U.S.C. 240(d); S. Rep. No. 1026, 93d Cong., Sess. 163 (1974))

APPENDIX A

[Pub. L. 81-874, Section 5(d)]

ASSISTANCE FOR LOCAL EDUCATIONAL AGENCIES IN AREAS AFFECTED BY FEDERAL ACTIVITIES; METHODS OF CALCULATIONS FOR TREATMENT OF PAYMENT UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs described the methods for making certain calculations in conjunction with determinations made under various requirements of the regulations set forth in this subpart. These methods shall be the only methods used in making calculations.

1. *Determinations of disparity standard compliance under § 115.62(b)(1).*

The determination of disparity in current expenditures or revenue per pupil shall be made by:

(a) Ranking all local educational agencies having similar grade levels within the State on the basis of current expenditures or revenues per pupil with respect to the fiscal year for which data has bee submitted in accordance with these regulations.

(b) Identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of these

agencies; and

(c) Subtracting the lower current expenditure of revenue per pupil figure from the higher for those agencies identified in paragraph (b) and dividing the difference by the lower figure.

Example: In State X, after ranking all local educational agencies organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in these agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1000. The percentage disparity between the 95th and 5th local educational agencies is 22 percent ($1000-$820=$180/$820). The program would be deemed to qualify.

2. *Determination under § 115.63(b) as to maximum proportion of Pub. L. 81-874 payments that may be taken into consideration by a State under an equalization program.* The proportion that local revenues covered under a State equalization program are of total local revenues for a particular local educational agency shall be obtained by dividing: (a) the amount of local revenues covered under the equalization program by (b) the total local revenues attributable to current education within the agency.

Examples:

Example 1: State A has an equalization program under which each LEA is guaranteed $900 per pupil less the

LEA contribution based on a uniform tax levy. LEA X contributes $700 per pupil and the State contributes the $200 difference. No other local revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act which may be taken into consideration by State A for LEA X is 100% (700/700). If LEA X receives $100 per pupil in Public Law 81-874 funds, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would not contribute the $100 difference.

Example 2: The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil. The percentage of Pub. L. 81-874 funds which may be taken into consideration is 87.5% (700/800). If LEA X receives $100 per pupil in Pub. L. 81-874 funds, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing &787.50 per pupil under the program and State A would now contribute $112/50 per pupil as the difference.

Example 3: State B has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels if tax rates. For an 8 mill rate the guarantee is $500, for 9 mills $550, for 10 mills $600. LEA Y levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option, realization another $300 per pupil. The percentage of Pub. L. 81-874 which may be taken into consideration is 50% (300/600). If LEA Y receives $100 per pupil in Pub. L. 81-874 funds, $50 per pupil may be taken into consideration. LEA Y may be regarded as contributing

$350 per pupil under the program and State B would now contribute $250 as the difference.

[FR Doc. 76–18005 Filed 6-24-76; 8:45 am]

FEDERAL REGISTER

Friday, September 29, 1995

Part VI
Department of Housing and Urban Development

Office of the Assistant Secretary for Community Planning and Development

Notice of Funding Availability for FY 1995 Historically Black Colleges and Universities Program: Notice

§ *222.165* What procedures does the Secretary follow after making a determination under section 8009?

Section 222.165 describes the procedures for administrative appeals of determinations by the Secretary and the procedures for corrective actions by States.

Waiver of Proposed Rulemaking

In accordance with the Administrative Procedure Act (5 U.S.C. 553), it is the Secretary's practice to offer interested parties the opportunity to comment on proposed regulations. However, these regulations merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor procedural revisions. Thus, the regulations do not establish or affect substantive policy. Therefore, the Secretary has determined with respect to amendments made due to statutory changes that, pursuant to 5 U.S.C. 553 (b)(B), publication of a proposed rule is unnecessary and contrary to the public interest, and with respect to the procedural changes that, pursuant to 5 U.S.C. 553(b)(A),

public comment is not required.

Regulatory Flexibility Act Certification

The Secretary certifies that these regulations would not have a significant economic impact on a substantial number of small entities. The small entities that would be affected by these regulations are small LEAs receiving Federal funds under this program. However, the regulations would not have a significant economic impact on the small LEAs affected because the regulations will not impose excessive regulatory burdens or require unnecessary Federal supervision. The regulations would impose minimal requirements to ensure the proper expenditure of program funds.

List of Subjects in Part 222

Education, Education of children with disabilities, Elementary and secondary education, Federally affected areas, Grant programs--education, Indians--education, Public housing, Reports and recordkeeping requirements, School construction.

34 CFR Part 218

Education, Elementary and secondary education, Federally affected areas, Grant programs--education.

34 CFR Part 219

Education, Elementary and secondary education, Federally affected areas, Grant programs--education, Reports and recordkeeping requirements, School construction.

34 CFR Parts 221 and 222

Education, Elementary and secondary education, Federally affected areas, Grant programs--education, Reports and recordkeeping requirements, School construction.

34 CFR Part 223

Education, Elementary and secondary education, Federally affected areas, Grant programs--education, Indians--education.

Dated: September 25, 1995.

Thomas W. Payzant,
Assistant Secretary for Elementary and Secondary Education.

(Catalog of Federal Domestic Assistance Number 84.041, Impact Aid—Maintenance and Operations)

For the reasons set out in the preamble and under the authority at 20 U.S.C. 7701-7714, the Secretary amends chapter II of title 34 of the Code of Federal Regulations as follows:

Part 218 [Removed]

1. Part 218 is removed.

Part 219 [Removed]

2. Part 219 is removed.

Part 221 [Removed]

3. Part 221 is removed.

Part 223 [Removed]

4. Part 223 is removed.

5. Part 222 is revised to read as follows:

PART 222--IMPACT AID PROGRAMS

Subpart A—General

Sec.

222.1 What is the scope of this part?
222.2 What definitions apply to this part?
222.3 How does a local educational agency apply for assistance under section 8002 or 8003 of the Act?
222.4 How does the Secretary determine when an application is timely filed?
222.5 When may a local educational agency amend its application?
222.6 Which applications does the Secretary accept?
222.7 What information may a local educational agency submit after the application deadline?
222.8 What action must an applicant take upon a change in its boundary, classification, control, governing authority, or identity?
222.9 What records must a local educational agency maintain?
222.10 How long must a local educational agency retain records?
222.11 How does the Secretary recover overpayments?
222.12 [Reserved]
222.13 What other statutes and regulations apply to this part?

222.14-222.19[Reserved]

Subpart B—Payments for Federal Property under Section 8002 of the Act

222.20 What definitions apply to this subpart?
222.21 What requirements must a local educational agency meet concerning Federal acquisition of real property within the local educational agency?
222.22 How does the Secretary treat compensation from Federal activities for purposes of determining eligibility and payments?
222.23-222.29 [Reserved]

Subpart C—Payments for Federally Connected Children under Section 8003(b) and (e) of the Act

222.30 What is "free public education"?
222.31 To which local educational agencies does the Secretary make basic support payments under section 8003(b) of the Act?
222.32 Upon what information is a local educational agency's basic support payment based?
222.33 When must an applicant make its first or only membership count?
222.34 If an applicant makes a second membership count, when must that count be made?
222.35 How does a local educational agency count the membership of its federally connected children?
222.36 What minimum number of federally connected children must a local educational agency have to receive a payment on behalf of those children under section 8003(b) and (e)?
222.37 How does the Secretary calculate the average daily attendance of federally connected children?

222.38 What is the maximum basic support payment that a local educational agency may receive under section 8003(b)?
222.39 How does a State educational agency identify generally comparable local educational agencies for local contribution rate purposes?
222.40 How does a local educational agency select a local contribution rate based on generally comparable local educational agencies?
222.41 How does a State educational agency compute local contribution rates based upon generally comparable local educational agencies?
222.42-222.49 [Reserved]

Subpart D—Payments under Section 8003(d) of the Act for Local Educational Agencies That Serve Children with Disabilities

222.50 What definitions apply to this subpart?
222.51 Which children may a local educational agency count for payment under section 8003(d) of the Act?
222.52 What requirements must a local educational agency meet to receive a payment under section 8003(d)?
222.53 What restrictions and requirements apply to the use of funds provided under section 8003(d)?
222.54 What supplement-not-supplant requirement applies to this subpart?
222.55 What other statutes and regulations are applicable to this subpart?
222.56-222.59 [Reserved]

Subpart E--Additional Assistance for Heavily Impacted Local Educational Agencies under Section 8003(f) of the Act

222.60 What are the scope and purpose of these regulations?

222.61 What data are used to determine a local educational agency's eligibility and payment under section 8003(f) of the Act?

222.62 Which local educational agencies are eligible to apply for an additional payment under section 8003(f)?

222.63 What other requirements must a local educational agency meet in order to be eligible for financial assistance under section 8003(f)(2)(A)?

222.64 What other requirements must a local educational agency meet in order to be eligible for financial assistance under section 8003(f)(2)(B)?

222.65 How may a State aid program affect a local educational agency's eligibility for assistance under section 8003(f)?

222.66 How does the Secretary determine whether a fiscally independent local educational agency is making a reasonable tax effort?

222.67 What tax rates does the Secretary use if real property is assessed at different percentages of true value?

222.68 What tax rates does the Secretary use if two or more different classifications of real property are taxed at different rates?

222.69 What tax rates may the Secretary use if substantial local revenues are derived from local tax sources other than real property taxes?

222.70 How does the Secretary determine whether a fiscally dependent local educational agency is

making a reasonable tax effort?
222.71 What information must be provided by the State educational agency?
222.72 How does the Secretary determine a maximum payment for local educational agencies that are eligible for financial assistance under section 8003(f)(2)(A) and § 222.63?
222.73 How does the Secretary determine a maximum payment for local educational agencies that are eligible for financial assistance under section 8003(f)(2)(B) and § 222.64?
222.74 How does the Secretary identify generally comparable local educational agencies for purposes of section 8003(f)?
222.75 How does the Secretary compute the average per pupil expenditure of generally comparable local educational agencies under this subpart?
222.76 What does the Secretary do if appropriation levels are insufficient to pay in full the amounts calculated under §§ 222.72 and 222.73?
222.77-222.79 [Reserved]

Subpart F—[Reserved]

Subpart G—Special Provisions for Local Educational Agencies that Claim Children Residing on Indian Lands

General

222.90 What definitions apply to this subpart?
222.91 What requirements must a local educational agency meet to receive a payment under section 8003 of the Act for children residing on Indian lands?
222.92 What additional statutes and regulations apply to

this subpart?
222.93 [Reserved]

Indian Policies and Procedures

222.94 What provisions must be included in a local educational agency's Indian policies and procedures?
222.95 How are Indian policies and procedures reviewed to ensure compliance with the requirements in section 8004(a) of the Act?
222.96-222.101 [Reserved]

Indian Policies and Procedures Complaint and Hearing Procedures

222.102 Who may file a complaint about a local educational agency's Indian policies and procedures?
222.103 What must be included in a complaint?
222.104 When does the Assistant Secretary consider a complaint received?
222.105-222.107 [Reserved]
222.108 What actions must be taken upon receipt of a complaint?
222.109 When may a local educational agency reply to a complaint?
222.110 What are the procedures for conducting a hearing on a local educational agency's Indian policies and procedures?
222.111 What is the authority of the hearing examiner in conducting a hearing?
222.112 What procedures are followed after the hearing?
222.113 What are the responsibilities of the Assistant Secretary after the hearing?

222.114-222.129 [Reserved]

Subpart H—[Reserved]

Subpart I—Facilities Assistance and Transfers under Section 8008 of the Act

222.140 What definitions apply to this subpart?
222.141 For what types of projects may the Secretary provide assistance under section 8008 of the Act?
222.142 What terms and conditions apply to minimum school facilities operated under section 8008 by another agency?
222.143 What terms and conditions apply to the transfer of minimum school facilities?
222.144-222.149 [Reserved]

Subpart J—Impact Aid Administrative Hearings and Judicial Review under Section 8011 of the Act

222.150 What is the scope of this subpart?
222.151 When is an administrative hearing provided to a local educational agency?
222.152 When may a local educational agency request reconsideration of a determination?
222.153 How must a local educational agency request an administrative hearing?
222.154 How must written submissions under this subpart be filed?
222.155 When and where is an administrative hearing held?
222.156 How is an administrative hearing conducted?
222.157 What procedures apply for issuing or appealing an administrative law judge's decision under section 8011(a) of the Act?

222.158 What procedures apply to the Secretary's review of an initial decision or certified record?
222.159 When and where does a party seek judicial review?

Subpart K—Determinations under Section 8009 of the Act

222.160 What are the scope and purpose of this subpart?
222.161 How is State aid treated under section 8009 of the Act?
222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?
222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?
222.164 What procedures does the Secretary follow in making a determination under section 8009?
222.165 What procedures does the Secretary follow after making a determination under section 8009?
222.166-222.169 [Reserved]

Appendix to Subpart K—Determinations Under Section 8009 of the Act—Methods of Calculations for Treatment of Impact Aid Payments under State Equalization Programs

Authority: 20 U.S.C. 7701-7714, unless otherwise noted.

Subpart A—General

§ 222.1 What is the scope of this part?

The regulations in this part govern the provision of financial assistance under title VIII of the Elementary and Secondary Education Act of 1965 (ESEA) to local educational agencies (LEAs) in areas affected by Federal activities.

(Authority: 20 U.S.C. 7701-7714)

§ 222.2 What definitions apply to this part?

(a) (1) The following terms defined in section 8013 of the Act apply to this part:

Armed forces
Average per-pupil expenditure
Construction
Current expenditures
Indian lands
Local contribution percentage
Low-rent housing
School facilities

(2) The following term defined in § 222.30 applies to this part:

Free public education

(b) The following terms defined in section 14101 of the ESEA (General Provisions) also apply to this part:

Average daily attendance (ADA)
Child
County
Department
Outlying area
Parent

§ 222.162 What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

(a) *Percentage disparity limitation.* The Secretary will consider that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenue per pupil for free public education among LEAs in the State is no more than 25 percent for fiscal years 1995, 1996, and 1997; and no more than 20 percent for fiscal years 1998 and 1999. In determining the disparity percentage, the Secretary shall disregard LEAs with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is set forth in the appendix to this subpart.

(b)(1) *Weighted average disparity for different grade level groups.* If a State requests it, the Secretary will make separate disparity computations for different groups of LEAs in the State that have similar grade levels of instruction.

(2) In those cases, the weighted average disparity for all groups, based on the proportionate number of pupils in each group, may not be more than the percentage provided in paragraph (a) of this section. The method for calculating the weighted average disparity percentage is set out in the appendix to this subpart.

(c) *Per pupil figure computations.* In calculating the current expenditures or revenue disparities under this section, computations of per pupil figures are made on one of the following bases:

(1) The per pupil amount of current expenditures or revenue for an LEA is computed on the basis of the total number of pupils receiving free public education in the schools of the agency. The total number of pupils is determined in accordance with whatever standard measurement of pupil count is used in the State.

(2) If a State aid program uses "weighted pupil," "classroom," "instructional unit," or another designated measure of need in determining allocations of State aid to take account of special cost differentials, the computation of per pupil revenue or current expenditures may be made on those bases. The two allowable categories of special cost differentials are-

(i) Those associated with pupils having special educational needs, such as children with disabilities, economically disadvantaged children, non-English speaking children, and gifted and talented children; and

(ii) Those associated with particular types of LEAs such as those affected by geographical isolation, sparsity or density of population, high cost of living, or special socioeconomic characteristics within the area served by an LEA.

(d) *Revenues and current expenditures included in determinations*. All revenues or current expenditures must be included for each LEA in the State in determining the percentage of disparity under paragraph (a) of this section.

(Authority: 20 U.S.C. 7709)

§ 222.163 What proportion of Impact Aid funds may a State take into consideration upon certification?

(a) *Provision of law.* Section 8009(d)(1)(B) provides that, upon certification by the Secretary, in allocating State aid a State may consider as local resources funds received under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 only in proportion to the share that local tax revenues covered under a State equalization program are of total local tax revenues. Determinations of proportionality must be made on a case-by-case basis for each LEA affected and not on the basis of a general rule to be applied throughout a State.

(Authority: 20 U.S.C. 7709)

(b) *Computation of proportion.* (1) In computing the share that local tax revenues covered under a State equalization program are of total local tax revenues for an LEA with respect to a program qualifying under § 222.162, the proportion is obtained by dividing the amount of local tax revenues covered under the equalization program by the total local tax revenues attributable to current expenditures for free public education within that LEA.

(2) In cases where there are no local tax revenues for current expenditures and the State provides all of those revenues on behalf of the LEA, the State may consider up to 100 percent of the funds received under the Act by that LEA in allocating State aid.

(Authority: 20 U.S.C. 7709 (d) (1) (B))

(c) *Application of proportion to Impact Aid payments.* Except as provided in § 222.161(a)(1)(ii) and (iii), the

proportion established under this section (or a lesser proportion) for any LEA receiving payments under sections 8002 and 8003(b) (including hold harmless payments calculated under section 8003(e)) and Pub. L. 81-874 may be applied by a State to actual receipts of those payments or payments under pub. L. 81-874.

(Authority: 20 U.S.C. 7709 (d)(1)(B))

§ 222.164 What procedures does the Secretary follow in making a determination under section 8009?

(a) *Initiation.* (1) A proceeding under this subpart leading to a determination by the Secretary under section 8009 may be initiated—

(i) By the State educational agency (SEA) or other appropriate agency of the State;

(ii) By an LEA; or

(iii) By the Secretary, if the Secretary has reason to believe that the State's action is in violation of section 8009.

(2) Whenever a proceeding under this subpart is initiated, the party initiating the proceeding shall give adequate notice to the State and all LEAs in the State.

(b) *Submission.* (1) A submission by a State or LEA under this section must be made in the manner requested by the Secretary and must contain the information and assurances as may be required by the Secretary in order to reach a determination under section 8009 and this subpart.

(2) (i) A State in a submission shall—

(A) Demonstrate how its State aid program comports with § 222.162; and

(B) Demonstrate for each LEA receiving funds under the Act that the proportion of those funds that will be taken into consideration comports with § 222.163.

(ii) The submission must be received by the Secretary no later than 120 calendar days before the beginning of the State's fiscal year for the year of the determination, and must include (except as provided in § 222.161(c)(2)) final second preceding fiscal year disparity data enabling the Secretary to determine whether the standard in § 222.162 has been met. The submission is considered timely if received by the Secretary on or before the filing deadline or if it bears a U.S. Postal Service postmark dated on or before the filing deadline.

(3) An LEA in a submission must demonstrate whether the State aid program comports with section 8009.

(4) Whenever a proceeding is initiated under this subpart, the Secretary may request from a State the data deemed necessary to make a determination. A failure on the part of a State to comply with that request within a reasonable period of time results in a summary determination by the Secretary that the State aid program of that State does not comport with the regulations in this subpart.

(5) Before making a determination under section 8009, the Secretary affords the State, and all LEAs in the State, an

opportunity to present their views.

(c) *Determinations.* The Secretary reviews the participants' submissions and any views presented at a predetermination hearing under paragraph (b)(5) of this section, including views submitted during the post-hearing comment period. Based upon this review, the Secretary issues a written determination setting forth the reasons for the determination in sufficient detail to enable the State or LEAs to respond. The Secretary affords reasonable notice of a determination under this subpart and the opportunity for a hearing to the State or any LEA adversely affected by the determination.

(Authority: 20 U.S.C. 7709)

Note to Paragraph (b)(2) of this section: The U.S. Postal Service does not uniformly provide a dated postmark. Before relying on this method, an applicant should check with its local post office.

§ 222.165 What procedures does the Secretary follow after making a determination under section 8009?

(a) *Request for hearing.* (1) A State or LEA that is adversely affected by a determination under section 8009 and this subpart and that desires a hearing regarding that determination must submit a written request for a hearing within 30 days of receipt of the determination. The time within which a request must be filed may not be extended unless the Secretary, or the Secretary's delegatee, extends the time in writing at the time notice of the determination is given.

(2) A request f6r a hearing in accordance with this section

must specify the issues of fact and law to be considered.

(3) If an LEA requests a hearing, it must furnish a copy of the request to the State. If a State requests a hearing, it must furnish a copy of the request to all LEAs in the State.

(b) *Right to intervene.* Any LEA or State that is adversely affected by a determination shall have the right of intervention in the hearing.

(c) *Time and place of hearing.* The hearing is held at a time and place fixed by the Secretary or the Secretary's delegatee (with due regard to the mutual convenience of the parties).

(d) *Counsel* In all proceedings under this section, all parties may be represented by counsel.

(e) *Proceedings.* The Secretary refers the matter in controversy to an administrative law judge (ALJ) appointed under 5 U.S.C. 3105.

(f) *Filing requirements.* (1) Any written submission under this section must be filed by hand-delivery, mail, or facsimile transmission. The Secretary discourages the use of facsimile transmission for documents longer than five pages.

(2) If agreed upon by the parties, service of a document may be made upon the other party by facsimile transmission.

(3) The filing date for a written submission under this section is the date the document is

(i) Hand-delivered;

(ii) Mailed; or

(iii) Sent by facsimile transmission, followed by a mailed hard copy.

(4) A party filing by facsimile transmission is responsible for confirming that a complete and legible copy of the document was received by the Department.

(5) *Procedural rules.* (1) If, in the opinion of the ALJ, no dispute exists as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford each party to the proceeding an opportunity to present its case—

(i) In whole or in part in writing; or

(ii) In an informal conference after affording each party sufficient notice of the issues to be considered.

(2) With respect to hearings involving a dispute as to a material fact the resolution of which would be materially assisted by oral testimony, the ALJ shall afford the following procedures to each party:

(i) Sufficient notice of the issues to be considered at the hearing.

(ii) An opportunity to make a record of the proceedings.

(iii) An opportunity to present witnesses on the party's behalf.

(iv) An opportunity to cross-examine other witnesses either orally or through written interrogatories.

(h) *Decisions.* The ALJ shall make an initial decision based upon written findings, which shall be forwarded to the Secretary. The Secretary may, by appropriate notification to the parties, determine to review it or certify it as the final decision of the Secretary without further proceedings. Written notice of the initial decision shall be sent to all parties. In any case in which the Secretary modifies or reverses the initial decision, a notice of that action shall be accompanied by a written statement of the grounds for the reversal or modification. Notice of the final decision of the Secretary is served upon all parties to the hearing, the hearing panel and any LEA that may be adversely affected.

(Authority: 20 U.S.C. 7709 and 7711)

(i) *Corrective Action.* (1) Within 30 days after a determination by the Secretary that a State has been in violation of section 8009 unless the determination is timely appealed by the State, the State shall provide satisfactory written assurances that it will undertake appropriate corrective action if necessary.

(2) A State found by the Secretary to have been in violation of section 8009 following a hearing shall provide, within 30 days after disposal of the hearing request (such as by a final decision issued under this subpart or withdrawal of the hearing request), satisfactory assurances that it is taking corrective action, if necessary.

(3) At any time during a hearing under this subpart, a State may provide the Secretary appropriate assurances that it will undertake corrective action if necessary. The Secretary or the ALJ, as applicable, may stay the proceedings pending completion of corrective action.

(Authority: 20 U.S.C. 7709)

§§ 222.166-222.169 [Reserved]

Appendix to Subpart K

Determinations Under Section 8009 of the Act—Methods of Calculations for Treatment of Impact Aid Payments Under State Equalization Programs

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

1. *Determinations of disparity standard compliance under § 222.162(b)(1).*

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identifying those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of

pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820= $180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

(b) In cases under § 222.162(b), where separate computations are made for different groups of LEAs, the disparity percentage for each group is obtained in the manner described in paragraph (a) above. Then the weighted average disparity percentage for the State as a whole is determined by—

(i) Multiplying the disparity percentage for each group by the total number of pupils receiving free public education in the schools in that group;

(ii) Summing the figures obtained in paragraph (b)(i); and

(iii) Dividing the sum obtained in paragraph (b)(ii) by the total number of pupils for all the groups.

Example

Group 1 (grades 1-6), 80,000 pupils X 18.00% = ...	14,400
Group 2 (grades 7-12), 100,000 pupils X 22.00% = ...	22,000
Group 3 (grades 1-12), 20,000 pupils X 35.00% = ...	7,000
Total 200,000 pupils	43,400

43,400/200,000=21.70% Disparity

2. Determinations under § 222.163(b) as to maximum proportion of payments under the Act that may be taken into consideration by a State under an equalization program. The proportion that local tax revenues covered under a State equalization program are of total local tax revenues for a particular LEA shall be obtained by dividing: (a) The amount of local tax revenues covered under the equalization program by (b) the total local tax revenues attributable to current expenditures within the LEA. Local revenues that can be excluded from the proportion computation are those received from local non-tax sources such as interest, bake sales, gifts, donations, and in-kind contributions.

Examples

Example 1. State A has an equalization program under which each LEA is guaranteed $900 per pupil less the

LEA contribution based on a uniform tax levy. The LEA contribution from the uniform tax levy is considered under the equalization program. LEA X contributes the proceeds of the uniform tax levy, $700 per pupil, and the State contributes the $200 difference. No other local tax revenues are applied to current expenditures for education by LEA X. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). If LEA X receives $100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 2. The initial facts are the same as in Example 1, except that LEA X, under a permissible additional levy outside the equalization program, raises an additional $100 per pupil not covered under the equalization program. The permissible levy is not included in local tax revenues covered under the equalization program but it is included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 87.5 percent ($700/$800). If LEA X receives $100 per pupil in payments under the Act, $87.50 per pupil may be taken into consideration. LEA X is now regarded as contributing $787.50 per pupil under the program and State A would now contribute $112.50 per pupil as the difference.

Example 3. State B has an equalization program under which each LEA is guaranteed $900 per pupil for contributing the equivalent of a two mill tax levy. LEA X contributes $700 per pupil from a two mill tax levy and an additional $500 per pupil from local interest, bake sales,

in-kind contributions, and other non-tax local sources. The percentage of funds under the Act that may be taken into consideration by State A for LEA X is 100 percent ($700/$700). The local revenue received from interest, bake sales, in-kind contributions and other non-tax local revenues are excluded from the computation since they are from non-tax sources. If LEA X receives $ 100 per pupil in payments under the Act, $100 per pupil may be taken into consideration by State A in determining LEA X's relative financial resources and needs under the program. LEA X is regarded as contributing $800 and State A would now contribute the $100 difference.

Example 4. State C has an equalization program in which each participating LEA is guaranteed a certain per pupil revenue at various levels of tax rates. For an eight mill rate the guarantee is $500, for nine mills $550, for 10 mills $600. LEA X levies a 10 mill rate and realizes $300 per pupil. Furthermore, it levies an additional 10 mills under a local leeway option realizing another $300 per pupil. The $300 proceeds of the local leeway option are not included in local tax revenues covered under the equalization program, but they are included in total local tax revenues. The percentage of payments under the Act that may be taken into consideration is 50 percent ($300/$600). If LEA X receives $100 per pupil in payments under the Act, $50 per pupil may be taken into consideration. LEA X may be regarded as contributing $350 per pupil under the program and State B would now contribute $250 as the difference.

Example 5. The initial facts are the same as in Example 4, except that LEA Y in State C, while taxing at the same 10 mill rate for both the equalization program and leeway allowance as LEA X, realizes $550 per pupil for each tax.

As with LEA X, the percentage of payments under the Act that may be taken into consideration for LEA Y is 50 percent (550/1100). If LEA Y receives $150 per pupil in payments under the Act, then up to $75 per pupil normally could be taken into consideration. However, since LEA Y would have received only $50 per pupil in State aid, only $50 of the allowable $75 could be taken into consideration. Thus, LEA Z may be regarded as contributing $600 per pupil under the program and State B would not contribute any State aid.

[FR Doc. 95-24216 Filed 9-28-95; 8:45 am]

BILLING CODE 4000-01-P

APPENDIX F

UNITED STATES OF AMERICA
DEPARTMENT OF EDUCATION

IN THE MATTER OF	)	
ZUNI PUBLIC SCHOOL	)	Docket No. 99-81-I
DISTRICT #89 and	)	
	)	
GALLUP-MCKINLEY	)	Impact Aid
PUBLIC SCHOOLS	)	Proceeding
	)	
Applicants	)	
	)	

JOINT STIPULATION OF LEGAL BACKGROUND AND FINDINGS OF FACT

The Assistant Secretary for Elementary and Secondary Education, Respondent, the New Mexico Department of Education ("State"), Respondent, and Applicants Zuni Public School District #89 ("Zuni") and Gallup-McKinley County Public Schools ("Gallup-McKinley")respectfully submit the following stipulations. The parties reserve the right, however, to raise objections as to the relevance of any of these stipulated matters. The parties also reserve the right to proffer additional evidence, so long as such evidence is not inconsistent with any facts set forth by these stipulations.

A. LEGAL BACKGROUND: Section 8009(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7709(b) .

1. The Impact Aid law, Title VIII of the Elementary and Secondary Education Act of 1965 (20 U.S.C.§§ 7701 et seq.), (the "Impact Aid law" or "the Act") was enacted in 1994 to fulfill the Federal responsibility to assist with the provision of educational services to federally connected children by providing financial assistance for those local educational agencies ("LEAs") upon which the United States has placed financial burdens. Such burdens occur either because a school district's ability to raise local revenues has been decreased due to the Federal government's acquisition of real property or because a school district provides an education for children residing on, or whose parents are employed on, Federal property. 20 U.S.C. 7701.

2. Section 8009(a) (20 U.S.C. § 7709(a)) of the Impact Aid law provides:

   (a) General prohibition. -Except as provided in subsection (b), a State may not-

      (i) consider payments under this subchapter or under the Act of September 30, 1950 [20 U.S.C.A. §§ 236 to 244] (Public Law 874, 81st Congress) (as such Act was in effect on the day preceding October 20, 1994) in determining for any fiscal year -

         (A) the eligibility of a local educational agency for State aid for free public education; or

         (B) the amount Of such aid; or

      (2) make such aid available to local educational

agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not eligible.

3. Section 8009(b) (20 U.S.C. § 7709(b)) of the Impact Aid law provides, in pertinent part:

(b) State equalization plans.–

(1) In general.–

A State may reduce State aid to a local educational agency that receives a payment under Section 7702 or 7703 (b) of this title (except the amount calculated in excess of 1.0 under subparagraph (B) of Section 7703 (a)(2) of this title) or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] as such Act was in effect on the day preceding October 20, 1994 (other than an increase in payments described in paragraphs (2)(B), (2)(C), (2)(D), or (3)(B)(ii) of Section 3(d) of such Act of September 30, 1950 [20 U.S.C.A. § 238(d)]) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that such State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in such State.

(2) Computation. –

(A) In general.–

For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than twenty-five percent (25%).

(B) Other factors.- In making a determination under this subsection, the Secretary shall –

(i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the fifth percentile of such expenditures or revenues in the State; and

(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

4. In 1995, the Department of Education promulgated a regulation, 34 C.F.R. 222.162(a), pursuant to the

reauthorization of the Impact Aid program under P.L. 103-382. 60 Fed. Reg. 50774, 50798 (September 29, 1995). As originally promulgated section 222.162(a) provided:

> (a) Percentage Disparity limitation. The Secretary will consider that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is not more than 25 percent for fiscal years 1995, 1996, and 1997; and no more than 20 percent for fiscal years 1998 and 1999. In determining the disparity percentage, the Secretary shall disregard LEAs with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is set forth in the appendix to this subpart.

That regulation was subsequently amended to conform to a 1996 statutory amendment to section 8009(b)(2)(A) making 25% the maximum permissible disparity for certification for all years.

5. The appendix to Subpart K provides, in pertinent part:

> APPENDIX TO SUBPART K—DETERMINATIONS UNDER SECTION 8009 OF THE ACT—METHODS OF CALCULATIONS(sic) FOR TREATMENT OF IMPACT AID PAYMENTS UNDER STATE EQUALIZATION PROGRAMS
>
> The following paragraphs describe the methods for making certain calculations in conjunction with

determinations made under the regulations in this part. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these determinations.

1. Determinations of disparity standard Compliance under section 222.162(b)(1).

   (a) The determination of disparity in current expenditure or revenue per pupil are made by–

      (i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second proceeding fiscal year before the year of determination;

      (ii) identifying those LEAs in each ranking that fall at the 95th and fifth percentile of the total number of pupils in attendance in the schools of those LEAs; and

      (iii)Subtracting the lower current expenditure or revenue per pupil figure from the higher of those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th

percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820=$180/$8000. The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years.

6. Even upon certification, the State may not consider certain Impact Aid funds received by a district under certain provisions of the Impact Aid law. See Section 8009(b)(i)(20 U.S.C. § 7709(b)(1)) and 34 C.F.R. § 222.161(a)(i)(ii). Further, as described in section 8009(d)(i)(B) of the Act, only a specified proportion of eligible Impact Aid may be considered. That proportion is "the share that local tax revenues covered under a State equalization program are of total local tax revenues." Regulations implementing this proportion are codified at 34 C.F.R. §§ 22.163 and 222.161(c) (definitions of "Local tax revenues covered under a State equalization program" and "Total local tax revenues").

B. The New Mexico School Funding Program

7. The New Mexico Public School Finance Act governing the State equalization program is codified at N.M.S.A. §§ 22-8-1 et seq.

8. For the 1999-2000 fiscal year, the New Mexico formula guarantees each LEA 100% of its calculated program cost based on actual prior year membership regardless of the LEA's wealth.

9. Under the formula, each LEA's program cost is calculated through a three-step process. First, the

actual student membership counts of specified categories of students are multiplied by statutory weighting factors associated with special categories of needs to derive a number of program units for each category. These categories include early childhood education, basic education (with weights differentiated by grade level), special education students, bilingual education students.

10. Grade level program units for kindergarten and programs for three- and four-year-old students ("early childhood education program units") are derived by counting kindergarten and developmentally disabled three- and four-year-old students as 0.5 early childhood membership and multiplying the resulting membership by the statutory weighting factor. The special education services units for both kindergarten and developmentally disabled three- and four-year-old students are calculated by multiplying the actual number of children by an additional statutory weighting factor. The New Mexico formula guarantees each LEA 100% of its calculated program cost for these children.

11. In the second step, certain of the LEA's program units are multiplied by an instructional staff training and experience index then summed with the other program units that are not adjusted by this index. These units include units generated for size adjustment (school size, district size, and rural isolation), enrollment growth, new district adjustment, at- risk program units, and units generated by special education students enrolled in a specified program. The instructional staff training and experience index is not applied to the program units for size, at-risk students,

enrollment growth and new district adjustments or certain special education students. See NMSA § 22-8-18(A).

12. Finally, in step three, the number Calculated as described in the previous paragraph is multiplied by a dollar figure ("program unit value") established by the State Superintendent of Public Instruction as directed by the State legislature to derive the LEA's program cost. The program unit value is determined by the State Superintendent of Public Instruction and is calculated by dividing the legislatively appropriated program cost (comprised of the appropriated state equalization guarantee plus the projected credits for impact aid, forest reserve, and the .5 mill levy) by the total number of units generated by all school districts for a given fiscal year.

13. To determine the amount of the LEA's "equalization guarantee distribution" (i.e., State aid), the LEA's "local revenue" and "Federal revenue" are deducted from program cost.

14. N.M.S.A. Section 22-8-25(B) provides "local revenue" is seventy-five percent of the LEA's receipts of school district property tax. Prior to June 18, 1999 it was defined as ninety-five percent of such receipts.

15. N.M.S.A. Section 22-8-25(C) provides "Federal revenue" is 75% of the LEA's share of Federal forest reserve funds and 75% of the Impact Aid that the State is permitted to consider. Prior to June 18, 1999 it was defined as 95% of the LEA's share of Federal forest reserve funds and the Impact Aid that the State was Permitted to consider.

C. New Mexico's FY 2000 Request for Certification Under Section 8009(b).

16. By letter dated February 10, 1999, the Director, School Budget Planning Unit, Department of Education, State of New Mexico notified the U.S. Department of Education and all school district superintendents in the State of its intent to take Impact Aid into consideration in the calculation of FY 2000 State aid. On February 22, 1999, the State submitted final FY 1998 financial data from the State in support of its request for certification (Attachment 1). Included within the State's February 22, 1999 submission to the U.S. Department of Education is a spreadsheet labeled "IMPACT AID DISPARITY FOR 1999-2000 Revenue Per Mem." The second column in the spreadsheet is titled "TOTAL 97-98 ACTUAL REVENUE" and includes revenue generated by the units produced by each district's training and experience index. The spreadsheet labeled "IMPACT AID DISPARITY FOR 1999-2000 DISPARITY/ADJUSTMENTS" shows units and revenues removed from the "TOTAL 97-98 ACTUAL REVENUE" for the purpose of calculating disparity. The units generated by the districts' training and experience index are not included within the units listed on the "IMPACT AID DISPARITY FOR 1999-2000 DISPARITY/ADJUSTMENTS."

17. As required by Section 8009(b)(2), a program of State aid is determined to equalize expenditures among LEAs if, in the second preceding fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the LEA in the State with the highest such per-

pupil expenditures or revenues did not exceed the amount of such per/pupil expenditures made by, or per pupil revenues available to, the LEA in the State with the lowest such expenditures or revenues by more than 25 percent. In making this determination, the Secretary is required to disregard LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State, and is further required to take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of LEAs or to particular types of students. The State's position is that in calculating disparity for 1999-2000, the submission of the New Mexico State Department of Education (Attachment to letter to Catherine Schagh, dated February 22, 1999, pages 1, 2)(part of Attachment 2) reflects the following methodology: (1) first calculating the revenue per membership (determined according to federal regulation) for each LEA in the State, (2) ranking the LEAs according to revenues per membership from high to low, (3) then eliminating the top five percent (5%) and bottom five percent (5%) of state cumulative membership beginning at the top ranked LEAs and working down and then starting with the bottom ranked LEAs and working up, (4) drawing a line at those points at which the top five percent (5%) and the bottom five percent (5%) of state cumulative membership are reached. The LEAs above the top line and the LEAs below the bottom line are excluded and the revenue per membership of the remaining top LEA and the revenue per membership of the remaining bottom LEA are used to compute the disparity percentage. New Mexico's position is that the LEA at the 95th

percentile of state cumulative membership (not LEAs) was Penasco and the LEA at the fifth percentile of state cumulative membership (not LEAs) was Hobbs. The resulting disparity was 14.43%. Zuni's revenue per-pupil was $3,320.00. Gallup-McKinley's revenue per pupil was $2,861.00. The highest LEA revenue per-pupil was $6,520.00 and the lowest was $2,672.00. See Attachment 2, which shows the revenue per membership of the LEAs. The LEA parties in this proceeding wish to depose or pose interrogatories to the appropriate person or persons about the methodology used in the State's computations and will file an appropriate motion.

18. For fiscal year 1999-2000, total local property tax (.5 mill levy) revenues in New Mexico were $1,964,585.31 for the period 7/1/99 - 12/31/99, total Impact Aid basic payments were $58,376,914.60 as of 1/28/2000, and total forest reserve receipts were $456,180.34 as of 1/2000.

19. Pursuant to New Mexico statute, the sole local tax revenue for school district general operating purposes is a property tax rate of fifty cents ($.50) for each one thousand dollars ($1,000) of net taxable value of both residential and nonresidential property (including certain products and equipment related to copper, oil, and gas production) allocated to the school district. N.M.S.A. § 7-37-7.B(2). In accordance with the State's definition of "local revenue", seventy-five percent of such receipts (prior to June 18, 1999, ninety-five percent of such receipts) are "covered under the equalization program." By operation of State law, the proportion to the "share that local tax revenues covered under [the State] equalization

program are of total local tax revenues" is seventy-five percent. The determination of proportionality is consistent among all local educational agencies within the State.

20. On April 13, 1999, the Department notified all LEAs in the State of the availability of the February 22 State data submission and the opportunity for any LEA to request a hearing on the State's request.

21. On May 13, 1999, Bloomfield Schools requested a hearing but subsequently withdrew its request. As a consequence, no predetermination hearing was held since no other LEA requested a predetermination hearing. The determination was based on the State's data submission.

22. The Assistant Secretary's determination certifying the State was issued on October 5, 1999 (Attachment 2). A copy was provided to all LEAs in the State with notice of their right to a hearing. The parties are not stipulating that the disparity calculation or the calculation of that the offset to State aid was correct, but only that they occurred.

23. On October 25, 1999, Superintendent David L. Cockerham filed a hearing request on behalf of Zuni objecting to the determination. (Attachment 3).

24. On November 8, 1999, Superintendent Robert Gomez filed a hearing request on behalf of Gallup-McKinley objecting to the determination. (Attachment 4). Gallup-McKinley furnished a copy of its request to the State on or about December 3, 1999.

25. Attachment 5 shows certain tax receipts for Gallup-McKinley and certain Impact Aid Receipts and credits with regard to Gallup-McKinley and is stipulated to insofar as it accurately reflects data set forth in *New Mexico Public School Finance Statistics for* the years indicated.

26. The LEA parties' position is that there are additional local tax revenues not taken into account by New Mexico in applying the statutory proportion in Section 8009(d)(1)(B).

3/8/00
Dated

/s/
Mark W. Smith
Attorney for Respondent,
the Assistant Secretary for
Elementary and Secondary
Education, U.S. Department of
Education

3/8/00
Dated

/s/
Leigh M. Manasevit, Esq.
Jonathan D. Tarnow, Esq.
BRUSTEIN & MANASEVIT
Attorneys for Respondent,
New Mexico Department of Education

3/7/00
Dated

/s/
RONALD J. VanAMBERG
Attorney for Applicant,
Zuni Public School District #89

3/6/00
Dated

/s/
GEORGE W. KOZELISKI
Attorney for Applicant,

Gallup-McKinley County Pub. Schools
Post Office Box 478
Gallup, New Mexico 87305
505-863-9339

ATTACHMENT 1

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION —
EDUCATION BUILDING
SANTA FE, NEW MEXICO 87501-2786

MICHAEL J. DAVIS
SUPERINTENDENT OF
PUBLIC INSTRUCTION

Telephone: (505) 827-6516
Fax: (505)827-6696

February 22, 1999

Ms. Catherine Schagh, Director
Impact Aid Program
U.S. Department of Education
400 Maryland Avenue
Washington, D.C. 20202

Dear Ms. Schagh:

As required by Section 8009 of Title VIII, Public Law 103-382, this letter Shall serve as written notice that the State of New Mexico intends to consider 95% of eligible local sources of revenue and any eligible Impact Aid funds during the 1999-2000 school year. We are further advising you that we anticipate that legislation will be introduced during the upcoming legislative session (January 19 to March 20) that will, if enacted into law, provide that the state will consider 75% of eligible local sources of revenue and any eligible Impact Aid funds. Of the remaining 25%, 5% will continue to be available to the receiving district for operational use, while the remaining 20% will be set aside by the receiving district to be used for its own capital outlay needs. The attached copy of a memorandum sent to New Mexico school

districts shall serve as evidence that we have notified each local educational agency of our intent, as required by Section 8009.

In addition, we will not request a Local Contribution Rate for fiscal year 2000 for New Mexico applicants under Section 8003(b)(1)(C). We have opted to request the minimum rate of payment guaranteed by statute, one-half of the average per-pupil expenditure of all States.

Sincerely,

/s/
MICHAEL J. DAVIS
State Superintendent of Public Instruction

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION —
EDUCATION BUILDING
SANTA FE, NEW MEXICO 87501-2786

MICHAEL J. DAVIS
SUPERINTENDENT OF
PUBLIC INSTRUCTION

Telephone: (505) 827-6516
Fax: (505)827-6696

February 10, 1999

MEMORANDUM

To: School District Superintendents

From: Kathleen Forrer, Ed.D., Director
School Budget Planning Unit

Subject: Impact Aid Credit

Pursuant to the requirements of Section 8009 of Title VIII, Public Law 103-382, this letter shall serve as notification to your local education agency that the State Of New Mexico intends to consider 95% of eligible local sources of revenue and any eligible Impact Aid funds during the 1999-2000 school year. We are further advising you that we anticipate that legislation will be introduced during the upcoming legislative session (January 19 to March 20) that will, if enacted into law, provide that the state will consider 75% of eligible local sources of revenue and any eligible Impact Aid funds. Of the remaining 25%, 5% will continue to be available to the receiving district for operational use, while the remaining 20% will be Set aside by the receiving district to be used for its own capital outlay needs.

STATE OF NEW MEXICO
DEPARTMENT OF EDUCATION —
EDUCATION BUILDING
SANTA FE, NEW MEXICO 87501-2786

MICHAEL J. DAVIS
SUPERINTENDENT OF
PUBLIC INSTRUCTION

Telephone: (505) 827-6516
Fax: (505)827-6696

February 22, 1999

Ms. Catherine Schagh, Director
Impact Aid Program
U.S. Department of Education
600/ndependence Avenue, S.W.
Washington, D.C. 20202-6244

Dear Ms. Schagh:

Enclosed for your approval is the Impact Aid (Title VIII) Disparity analysis for the State of New Mexico. Pursuant to federal regulation, all applicable local revenue received by New Mexico school districts in 1997-98 have been included. Also included is a worksheet on the proportion of local equalized revenue to total local revenue for your review.

In accordance with Section 222.161, we request that the 1997-98 data be used to determine New Mexico's eligibility for Impact Aid funding for 1999-2000.

If you have any questions or need additional information, please contact me at 827-3860.

Sincerely,

/s/

Kathleen Forrer, Ed.D.
Director
School Budget Planning/School Finance Analysis and Capital Outlay

NEW MEXICO STATE DEPARTMENT OF EDUCATION

IMPACT AID DISPARITY FOR 1999-2000
Based on Actual Revenue for 1997-1998

DIST.	REV/ MEM.	TOTAL MEM.	CUM. MEM.	REV/MEM AT 95/5%
Mosquero	$6,520	57.00	57.0	
Corona	$5,791	81.00	138.0	
Los Alamos	$5,611	3509.50	3647.5	
Vaughn	$4,641	111.50	3759.0	
Hondo Valley	$3,690	157.50	3916.5	
Maxwell	$3,591	152.00	4068.5	
Mora	$3,530	707.50	4776.0	
Roy	$3,516	113.00	4889.0	
Logan	$3,484	278.00	5167.0	
Cuba	$3,404	773.00	5940.0	
Silver City	$3,391	3837.50	9777.5	
Texico	$3,335	498.00	10275.5	
Zuni	$3,320	1696.00	11971.5	
Springer	$3,295	285.50	12257.0	
Jemez Valley	$3,286	513.50	12770.5	
Ruidoso	$3,278	2408.00	15178.5	
Tatum	$3,266	369.00	15547.5	
Penasco	$3,259	709.50	16257.0	$3,259
Raton	$3,249	1479.50		
Tularosa	$3,246	1140.50		
Bernalillo	$3,244	3528.50		
Las Vegas West	$3,241	2130.50		
Mesa Vista	$3,233	572.00		
Hatch	$3,206	1410.50		
Loving	$3,204	556.50		

DIST.	REV/ MEM.	TOTAL MEM.	CUM. MEM.	REV/MEM AT 95/5%
Mountainair	$3,195	365.00		
Cobre	$3,194	2067.00		
Melrose	$3,187	287.50		
Taos	$3,164	3326.50		
Pojoaque	$3,155	1937.50		
Wagon Mound	$3,154	185.00		
Carlsbad	$3,152	6690.00		
Clayton	$3,151	732.50		
Espanola	$3,147	4920.50		
Jemez Mountain	$3,123	415.50		
Las Vegas City	$3,122	2623.50		
Ft. Sumner	$3,100	428.00		
Magdalena	$3,092	377.50		
Jal	$3,091	534.00		
Cimarron	$3,088	666.50		
Reserve	$3,087	270.00		
Lordsburg	$3,074	860.50		
Albuquerque	$3,071	83709.50		
Chama	$3,065	620.00		
San Jon	$3,059	217.50		
Questa	$3,054	638.50		
Santa Fe	$3,050 1	3044.00		
Grants	$3,035	3699.00		
Pecos	$3,033	878.50		
Central	$3,027	314.00		
Santa Rosa	$3,011	860.00		
Elida	$3,006	127.00		
Estancia	$3,002	950.00		
Dora	$2,996	254.00		

DIST.	REV/ MEM.	TOTAL MEM.	CUM. MEM.	REV/MEM AT 95/5%
Roswell	$2,992	10528.50		
Clovis	$2,983	8639.50		
Alamogordo	$2,982	7824.50		
Tucumcari	$2,975	1526.50		
Animas	$2,975	580.50		
Portales	$2,975	2806.50		
Las Cruces	$2,974	21365.50		
Socorro	$2,968	2204.50		
Bloomfield	$2,968	3358.50		
Artesia	$2,964	3861.00		
Lovington	$2,963	2909.00		
Capitan	$2,962	622.50		
Rio Rancho	$2,959	8590.50		
Belen	$2,948	4732.50		
Farmington	$2,948	10153.00		
Truth or Cons.	$2,945	1771.00		
Aztec	$2,942	3283.50		
House	$2,936	119.00		
Grady	$2,915	159.50		
Deming	$2,912	5326.00		
Los Lunas	$2,887	7946.50		
Cloudcroft	$2,884	545.00		
Dexter	$2,883	1161.50		
Carrizozo	$2,880	222.50		
Moriarty	$2,870	4643.50		
Gallup	$2,861	13815.00		
Quemado	$2,858	214.50		
Eunice	$2,849	780.00		
Hobbs	$2,848	8114.50	22012.0	$2,848
Gadsen	$2,829	12000.50	13897.5	
Lake Arthur	$2,787	245.50	1897.0	

DIST.	REV/ MEM.	TOTAL MEM.	CUM. MEM.	REV/MEM AT 95/5%
Dulce	$2,783	718.00	1,651.5	
Hagerman	$2,777	475.50	933.5	
Floyd	$2,725	261.50	458.0	
Des Moines	$2,672	196.50	196.5	
TOTAL:		317,777.00		$411
	5% OF MEM	15,888.85	DISPARITY	14.43%

[FOLD OUT EXHIBITS]

NEW MEXICO STATE DEPARTMENT OF EDUCATION
SCHOOL BUDGET PLANNING UNIT

IMPACT AID DISPARITY FOR 1999-2000
Revenue Per Mem

DISTRICT	TOTAL 97-98 ACTUAL REVENUE	LESS ADJUSTMENTS	TOTAL REVENUE	FINAL FUND. MEM 1997-98	REVENUE PER MEM	LOCAL TAX @ 100%	LOCAL TAX @ 95%	PROPORTIONATE
ALAMOGORDO	$27,446,631	$4,115,459	$23,331,172	7,824.5	$2,982	$133,143	$126,486	95%
ALBUQUERQUE	$355,152,532	$98,088,787	$257,063,745	83,709.5	$3,071	$2,256,344	$2,143,527	95%
ANIMAS	$2,588,924	$862,085	$1,726,839	580.5	$2,975	$27,124	$25,767	95%
ARTESIA	$14,952,365	$3,508,519	$11,443,846	3,861.0	$2,964	$222,304	$211,189	95%
AZTEC	$12,780,033	$3,119,813	$9,660,220	3,283.5	$2,942	$247,947	$235,550	95%
BELEN	$19,393,872	$5,440,482	$13,953,390	4,732.5	$2,948	$79,459	$75,486	95%
BERNALILLO	$17,482,873	$6,034,894	$11,447,979	3,528.5	$3,244	$56,401	$53,581	95%
BLOOMFIELD	$13,219,439	$3,251,321	$9,968,119	3,358.5	$2,968	$234,944	$223,197	95%
CAPITAN	$2,833,986	$989,858	$1,844,129	622.5	$2,962	$30,545	$29,018	95%
CARLSBAD	$26,617,832	$5,531,595	$21,086,237	6,690.0	$3,152	$293,479	$278,805	95%
CARRIZOZO	$1,277,194	$636,396	$640,798	222.5	$2,880	$8,393	$7,974	95%
CENTRAL	$30,281,982	$8,142,267	$22,139,715	7,314.0	$3,027	$333,583	$316,885	95%
CHAMA	$3,455,987	$1,555,382	$1,900,605	620.0	$3,065	$17,725	$16,839	95%
CIMARRON	$3,505,455	$1,447,247	$2,058,208	666.5	$3,088	$51,158	$48,600	95%
CLAYTON	$3,713,964	$1,405,494	$2,308,470	732.5	$3,151	$28,795	$27,355	95%
CLOUDCROFT	$2,652,829	$1,081,156	$1,571,674	545.0	$2,884	$20,619	$19,588	95%
CLOVIS	$32,373,972	$6,603,789	$25,770,183	8,639.5	$2,983	$145,158	$137,900	95%
COBRE	$9,905,682	$3,303,914	$6,601,768	2,067.0	$3,194	$90,292	$85,778	95%
CORONA	$779,112	$310,048	$469,064	81.0	$5,791	$10,304	$9,789	95%
CUBA	$3,923,360	$1,292,096	$2,631,264	773.0	$3,404	$16,037	$15,235	95%
DEMING	$18,959,647	$5,448,508	$15,511,138	5,326.0	$2,912	$93,124	$88,468	95%
DES MOINES	$1,091,120	$566,100	$525,020	196.5	$2,672	$5,912	$5,617	95%
DEXTER	$5,322,191	$1,973,447	$3,348,744	1,161.5	$2,883	$9,445	$8,972	95%
DORA	$1,424,437	$663,466	$760,970	254.0	$2,996	$8,371	$7,952	95%
DULCE	$3,387,408	$1,388,959	$1,998,449	718.0	$2,783	$140,171	$133,163	95%
ELIDA	$818,605	$436,866	$381,739	127.0	$3,006	$5,995	$5,696	95%
ESPANOLA	$22,131,602	$8,647,050	$15,484,552	4,920.5	$3,147	$49,807	$47,317	95%
ESTANCIA	$4,225,955	$1,373,784	$2,852,171	950.0	$3,002	$19,076	$18,122	95%
EUNICE	$3,271,027	$1,048,902	$2,222,125	780.0	$2,849	$111,466	$105,893	95%
FARMINGTON	$37,577,106	$7,645,084	$29,932,022	10,153.0	$2,948	$259,992	$246,992	95%
FLOYD	$1,467,386	$754,895	$712,491	261.5	$2,725	$4,154	$3,946	95%
FT. SUMNER	$2,250,063	$923,131	$1,326,932	428.0	$3,100	$14,517	$13,791	95%
GADSDEN	$45,597,839	$11,644,365	$33,953,474	12,000.5	$2,829	$105,138	$99,881	95%
GALLUP	$50,663,804	$11,137,616	$39,526,188	13,815.0	$2,861	$247,756	$235,369	95%
GRADY	$958,518	$493,640	$464,877	159.5	$2,915	$3,448	$3,276	95%
GRANTS	$14,731,619	$3,506,337	$11,225,282	3,699.0	$3,035	$61,694	$58,609	95%
HAGERMAN	$2,531,488	$1,210,855	$1,320,633	475.5	$2,777	$5,903	$5,608	95%
HATCH	$6,451,667	$1,929,754	$4,521,913	1,410.5	$3,206	$13,244	$12,581	95%
HOBBS	$27,886,255	$4,774,099	$23,112,156	8,114.5	$2,848	$188,991	$179,542	95%
HONDO VALLEY	$1,099,892	$518,757	$581,135	157.5	$3,690	$4,654	$4,422	95%

NEW MEXICO STATE DEPARTMENT OF EDUCATION
SCHOOL BUDGET PLANNING UNIT

IMPACT AID DISPARITY FOR 1999-2000
Revenue Per Mem

DISTRICT	TOTAL 97-98 ACTUAL REVENUE	LESS ADJUSTMENTS	TOTAL REVENUE	FINAL FUND. MEM 1997-98	REVENUE PER MEM	LOCAL TAX @ 100%	LOCAL TAX @ 95%	PROPORTIONATE
HOUSE	$818,919	$469,528	$349,391	119.0	$2,936	$3,307	$3,142	95%
JAL	$2,695,814	$1,045,179	$1,650,636	534.0	$3,091	$63,170	$60,012	95%
JEMEZ MOUNTAIN	$2,441,945	$1,144,170	$1,297,775	415.5	$3,123	$69,359	$65,891	95%
JEMEZ VALLEY	$2,891,931	$1,204,332	$1,687,599	513.5	$3,286	$14,311	$13,595	95%
LAKE ARTHUR	$1,416,847	$732,657	$684,190	245.5	$2,787	$6,410	$6,090	95%
LAS CRUCES	$88,720,575	$25,187,046	$63,533,529	21,385.5	$2,974	$369,988	$351,489	95%
LAS VEGAS CITY	$10,638,625	$2,447,230	$8,191,395	2,623.5	$3,122	$39,530	$37,553	95%
LAS VEGAS WEST	$10,177,339	$3,272,644	$6,904,695	2,130.5	$3,241	$27,099	$25,744	95%
LOGAN	$1,660,507	$691,889	$968,618	278.0	$3,484	$10,216	$9,705	95%
LORDSBURG	$4,652,573	$2,007,819	$2,644,754	860.5	$3,074	$22,263	$21,150	95%
LOS ALAMOS	$22,793,375	$3,102,738	$19,690,637	3,509.5	$5,611	$100,032	$95,030	95%
LOS LUNAS	$31,568,300	$8,627,261	$22,941,039	7,946.5	$2,887	$61,545	$58,468	95%
LOVING	$3,084,897	$1,301,905	$1,782,992	556.5	$3,204	$30,104	$28,599	95%
LOVINGTON	$11,446,715	$2,827,811	$8,618,904	2,909.0	$2,963	$144,215	$137,005	95%
MAGDALENA	$2,361,746	$1,194,347	$1,167,399	377.5	$3,092	$3,983	$3,784	95%
MAXWELL	$1,158,007	$612,182	$545,825	152.0	$3,591	$2,149	$2,041	95%
MELROSE	$1,598,797	$682,580	$916,216	287.5	$3,187	$8,015	$7,615	95%
MESA VISTA	$3,520,610	$1,671,283	$1,849,327	572.0	$3,233	$8,632	$8,200	95%
MORA	$3,626,850	$1,129,471	$2,497,379	707.5	$3,530	$8,824	$8,383	95%
MORIARTY	$18,601,821	$5,273,033	$13,328,788	4,643.5	$2,870	$66,971	$63,623	95%
MOSQUERO	$627,328	$255,702	$371,626	57.0	$6,520	$7,936	$7,540	95%
MOUNTAINAIR	$2,087,915	$921,909	$1,166,006	365.0	$3,195	$9,258	$8,796	95%
PECOS	$4,431,162	$1,767,050	$2,664,111	878.5	$3,033	$6,496	$6,172	95%
PENASCO	$3,762,462	$1,450,107	$2,312,354	709.5	$3,259	$4,159	$3,951	95%
POJOAQUE	$8,684,315	$2,571,544	$6,112,771	1,937.5	$3,155	$25,618	$24,337	95%
PORTALES	$10,668,358	$2,319,925	$8,348,433	2,806.5	$2,975	$41,181	$39,122	95%
QUEMADO	$1,270,005	$656,865	$613,140	214.5	$2,858	$14,694	$13,959	95%
QUESTA	$3,678,133	$1,728,320	$1,949,813	638.5	$3,054	$28,557	$27,129	95%
RATON	$6,362,397	$1,555,192	$4,807,205	1,479.5	$3,249	$24,367	$23,168	95%
RESERVE	$1,544,789	$711,225	$833,564	270.0	$3,087	$13,891	$13,196	95%
RIO RANCHO	$36,359,033	$10,939,463	$25,419,570	8,590.5	$2,959	$135,825	$129,034	95%
ROSWELL	$42,279,732	$10,776,349	$31,503,383	10,528.5	$2,992	$164,977	$156,728	95%
ROY	$802,650	$405,342	$397,308	113.0	$3,516	$2,400	$2,280	95%
RUIDOSO	$10,935,125	$3,041,764	$7,893,362	2,408.0	$3,278	$78,872	$74,928	95%
SAN JON	$1,222,925	$557,631	$665,294	217.5	$3,059	$4,497	$4,272	95%
SANTA FE	$50,902,545	$11,111,834	$39,790,712	13,044.0	$3,050	$432,979	$411,330	95%
SANTA ROSA	$4,734,907	$2,145,098	$2,589,808	860.0	$3,011	$18,992	$18,042	95%
SILVER CITY	$17,249,457	$4,235,965	$13,013,492	3,837.5	$3,391	$97,480	$92,606	95%
SOCORRO	$8,761,785	$2,218,137	$6,543,648	2,204.5	$2,968	$24,120	$22,914	95%
SPRINGER	$1,807,048	$866,329	$940,720	285.5	$3,295	$5,676	$5,392	95%

NEW MEXICO STATE DEPARTMENT OF EDUCATION
SCHOOL BUDGET PLANNING UNIT

IMPACT AID DISPARITY FOR 1999-2000
Revenue Per Mem

DISTRICT	TOTAL 97-98 ACTUAL REVENUE	LESS ADJUSTMENTS	TOTAL REVENUE	FINAL FUND. MEM 1997-98	REVENUE PER MEM	LOCAL TAX @ 100%	LOCAL TAX @ 95%	PROPORTIONATE
TAOS	$14,603,382	$4,077,346	$10,526,035	3,326.5	$3,164	$54,404	$51,684	95%
TATUM	$2,220,520	$1,015,468	$1,205,052	369.0	$3,266	$21,179	$20,120	95%
TEXICO	$2,679,551	$1,018,537	$1,661,014	498.0	$3,335	$12,313	$11,697	95%
TRUTH OR CONS.	$7,305,203	$2,088,750	$5,216,453	1,771.0	$2,945	$64,554	$61,326	95%
TUCUMCARI	$6,633,341	$2,092,067	$4,541,274	1,526.5	$2,975	$28,865	$27,422	95%
TULAROSA	$5,557,250	$1,855,101	$3,702,149	1,140.5	$3,246	$13,563	$12,885	95%
VAUGHN	$1,142,718	$625,197	$517,521	111.5	$4,641	$14,913	$14,167	95%
WAGON MOUND	$1,383,474	$798,497	$584,977	185.5	$3,154	$4,537	$4,310	95%
ZUNI	$8,597,151	$2,966,646	$5,630,505	1,696.0	$3,320	$1,010	$960	95%
TOTALS:	$1,330,356,506	360,204,681.900	$970,151,824	317,777.00	$3,192	$8,074,051	$7,670,348	95%

NEW MEXICO STATE DEPARTMENT OF EDUCATION
SCHOOL BUDGET PLANNING UNIT

IMPACT AID DISPARITY FOR 1999-2000
DISPARITY ADJUSTMENTS

1997-98 FINAL FUNDED MEM	BILINGUAL UNITS	A/B UNITS	RELATED SERV. UNITS	3Y/4Y DD UNITS	C UNITS	D UNITS	SAVE HARMLESS	DNPTC	TOTAL SIZE	GROWTH	AT-RISK UNITS	TOTAL ADJUSTMENTS	TIMES $2,178.00
ALAMOGORDO	22.415	559.300	328.000	232.000	355.000	234.000	0.000	0.000	41.388	0.000	122.062	1,892.165	$4,115,459
ALBUQUERQUE	5,835.085	6,180.300	12,351.250	1,112.000	3,511.000	9,404.000	0.000	6.000	0.995	0.000	6,897.663	45,098.293	$98,088,787
ANIMAS	0.000	28.000	20.000	12.000	25.000	24.000	0.000	0.000	275.809	0.000	11.552	396.361	$862,085
ARTESIA	201.585	334.600	365.250	132.000	109.000	144.000	0.000	0.000	144.438	0.000	182.239	1,613.112	$3,508,519
AZTEC	0.000	338.100	387.750	92.000	144.000	164.000	0.000	0.000	88.224	0.000	220.323	1,434.397	$3,119,813
BELEN	84.165	246.400	967.500	62.000	140.000	610.000	0.000	0.000	0.000	27.500	383.806	2,501.371	$5,440,482
BERNALILLO	703.665	147.000	531.500	92.000	195.000	324.000	0.000	4.000	286.332	0.000	491.167	2,774.664	$6,034,894
BLOOMFIELD	105.665	288.300	250.750	170.000	190.000	142.000	0.000	0.000	80.793	0.000	269.352	1,494.860	$3,251,321
CAPITAN	0.000	78.400	50.250	10.000	5.000	4.000	0.000	0.000	279.624	17.250	10.583	455.107	$989,858
CARLSBAD	126.835	771.400	578.750	146.000	186.000	460.000	0.000	0.000	49.500	0.000	222.777	2,543.262	$5,531,595
CARRIZOZO	0.000	21.700	15.250	12.000	7.000	12.000	0.000	0.000	208.852	7.250	8.544	292.596	$636,398
CENTRAL	602.335	408.800	1,004.500	176.000	353.000	442.000	0.000	0.000	136.998	67.000	552.938	3,743.571	$8,142,287
CHAMA	30.835	41.300	73.000	12.000	15.000	18.000	0.000	0.000	442.987	6.500	75.516	715.118	$1,555,382
CIMARRON	12.335	32.200	85.500	30.000	35.000	16.000	0.000	0.000	440.436	0.000	13.930	665.401	$1,447,247
CLAYTON	0.000	73.500	106.000	48.000	22.000	20.000	0.000	0.000	384.032	0.000	12.672	648.204	$1,409,494
CLOUDCROFT	0.000	60.900	47.500	10.000	.000	30.000	0.000	0.000	306.784	0.000	33.899	497.083	$1,081,158
CLOVIS	82.415	671.300	636.500	304.000	485.000	298.000	0.000	0.000	80.000	0.000	527.010	3,036.225	$6,603,789
COBRE	312.750	130.900	345.500	26.000	102.000	136.000	0.000	0.000	240.795	0.000	225.096	1,519.041	$3,303,914
CORONA	3.915	7.000	10.250	2.000	2.000	10.000	0.057	0.000	103.242	0.750	3.337	142.551	$310,048
CUBA	54.500	27.300	91.250	28.000	56.000	76.000	0.000	0.000	183.773	11.750	85.494	594.067	$1,292,096
DEMING	305.085	69.300	130.500	50.000	178.000	354.000	0.000	0.000	42.198	0.000	456.438	1,585.521	$3,448,508
DES MOINES	0.000	15.400	29.000	2.000	8.000	4.000	0.000	0.000	191.191	6.500	4.185	260.276	$566,100
DEXTER	45.335	99.400	187.750	66.000	74.000	84.000	0.000	0.000	249.998	10.750	120.099	907.332	$1,973,447
DORA	0.000	12.600	14.500	34.000	4.000	8.000	0.000	0.000	228.132	0.000	3.810	305.042	$663,466
DULCE	54.085	23.100	50.000	16.000	47.000	44.000	0.000	0.000	289.704	25.250	89.463	638.602	$1,388,959
ELIDA	0.000	20.300	3.500	4.000	4.000	0.000	16.089	0.000	146.350	2.250	4.389	200.858	$436,868
ESPANOLA	825.165	202.300	650.000	66.000	145.000	312.000	0.000	0.000	226.318	0.000	629.332	3,056.115	$6,647,050
ESTANCIA	5.335	61.600	120.250	36.000	27.000	36.000	0.000	0.000	291.740	22.250	29.450	631.625	$1,373,784
EUNICE	8.665	47.600	50.500	40.000	20.000	60.000	0.000	0.000	240.981	0.000	14.508	482.254	$1,048,902
FARMINGTON	538.000	634.200	679.750	212.000	377.000	342.000	0.000	0.000	0.000	0.000	732.031	3,514.981	$7,645,084
FLOYD	10.750	36.400	8.250	40.000	9.000	4.000	0.000	0.000	223.328	0.000	15.350	347.078	$754,895
FT. SUMNER	0.000	71.400	17.000	18.000	11.000	8.000	0.000	0.000	288.145	0.000	12.883	424.428	$923,131
GADSDEN	926.085	543.900	1,436.500	318.000	484.000	548.000	0.000	0.000	0.000	0.000	1,099.248	5,353.731	$11,644,365
GALLUP-McKINLEY	415.165	639.100	884.500	442.000	572.000	514.000	0.000	0.000	535.622	0.000	1,138.356	5,120.743	$11,137,818
GRADY	0.000	17.500	7.500	2.000	0.000	2.000	14.418	0.000	180.002	0.000	3.541	226.961	$493,640
GRANTS-CIBOLA	55.915	130.900	273.000	84.000	101.000	194.000	0.000	0.000	398.585	0.000	374.709	1,612.109	$3,506,337
HAGERMAN	46.165	43.400	91.000	34.000	12.000	14.000	0.000	0.000	246.662	5.000	64.288	556.715	$1,210,855
HATCH	244.585	51.800	64.250	48.000	47.000	74.000	0.000	0.000	217.827	0.000	139.781	887.243	$1,929,754
HOBBS	31.500	508.200	583.250	168.000	267.000	326.000	0.000	0.000	31.088	0.000	279.950	2,194.988	$4,774,099
HONDO VALLEY	6.500	29.400	12.000	10.000	1.000	0.000	4.588	0.000	172.406	0.000	2.615	238.509	$518,737
HOUSE	0.000	13.300	9.750	8.000	1.000	12.000	26.005	0.000	144.035	0.000	1.785	215.875	$469,528
JAL	0.000	47.600	68.750	32.000	29.000	12.000	0.000	0.000	271.007	0.000	20.185	480.542	$1,045,179
JEMEZ MOUNTAIN	45.165	13.300	13.250	0.000	11.000	22.000	0.000	0.000	382.200	0.000	39.140	526.055	$1,144,170
JEMEZ VALLEY	39.085	39.900	36.500	20.000	19.000	52.000	0.000	0.000	296.394	0.000	60.837	553.716	$1,204,332
LAKE ARTHUR	4.665	22.400	40.000	6.000	5.000	12.000	0.000	0.000	231.421	0.000	15.368	336.854	$732,657
LAS CRUCES	397.250	2,161.900	3,645.750	396.000	610.000	2,576.000	0.000	0.000	49.155	0.000	1,734.196	11,580.281	$25,197,046
LAS VEGAS CITY	244.165	171.500	224.250	26.000	66.000	88.000	0.000	0.000	177.422	0.000	107.826	1,125.163	$2,447,230

NEW MEXICO STATE DEPARTMENT OF EDUCATION
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IMPACT AID DISPARITY FOR 1999-2000
DISPARITY ADJUSTMENTS

1997-98 FINAL FUNDED MEM	BILINGUAL UNITS	A/B UNITS	RELATED SERV. UNITS	3Y/4Y DD UNITS	C UNITS	D UNITS	SAVE HARMLESS	DNPTC	TOTAL SIZE	GROWTH	AT-RISK UNITS	TOTAL ADJUSTMENTS	TIMES $2,175.00
LAS VEGAS WEST	326.835	77.000	238.500	28.000	88.000	174.000	0.000	0.000	312.224	25.750	234.355	1,504.664	$3,272,644
LOGAN	0.000	16.800	15.500	14.000	3.000	28.000	0.000	0.000	238.416	0.000	4.392	318.110	$691,889
LORDSBURG	7.835	67.200	86.250	144.000	29.000	92.000	0.000	0.000	427.322	0.000	69.528	923.135	$2,007,819
LOS ALAMOS	0.000	520.100	378.250	80.000	71.000	260.000	0.000	0.000	64.553	0.000	52.643	1,426.547	$3,102,738
LOS LUNAS	364.335	357.700	1,288.500	218.000	250.000	862.000	0.000	0.000	0.000	131.750	494.272	3,966.557	$8,627,261
LOVING	41.250	38.500	90.750	28.000	19.000	28.000	0.000	0.000	270.648	8.750	73.681	598.577	$1,301,905
LOVINGTON	93.085	274.400	248.000	120.000	82.000	116.000	0.000	0.000	182.809	0.000	183.849	1,300.143	$2,827,811
MAGDALENA	18.500	18.900	86.500	32.000	21.000	50.000	0.000	0.000	269.677	0.000	52.548	549.125	$1,194,347
MAXWELL	0.000	23.800	45.250	12.000	7.000	4.000	0.000	0.000	167.859	9.500	12.054	281.463	$612,182
MELROSE	0.000	42.000	4.000	14.000	2.000	4.000	0.000	0.000	235.525	0.000	12.305	313.830	$682,580
MESA VISTA	135.000	17.500	51.000	4.000	28.000	56.000	0.000	0.000	398.256	0.000	78.850	768.406	$1,671,283
MORA	81.835	58.700	55.000	16.000	3.000	4.000	0.000	0.000	280.829	0.000	21.933	519.297	$1,129,471
MORIARTY	104.585	358.400	1,147.500	116.000	217.000	368.000	0.000	0.000	0.995	44.250	59.653	2,424.383	$5,273,033
MOSQUERO	0.000	9.100	18.750	8.000	2.000	0.000	0.315	0.000	74.986	0.000	6.413	117.564	$255,702
MOUNTAINAIR	0.000	28.000	83.000	20.000	13.000	32.000	0.000	0.000	231.158	3.750	12.958	423.866	$921,909
PECOS	120.585	78.300	125.500	32.000	51.000	30.000	0.000	0.000	256.434	0.000	120.618	812.437	$1,767,050
[illegible]NASCO	127.250	43.400	81.000	12.000	9.000	24.000	0.000	0.000	291.304	0.000	98.782	666.718	$1,450,107
[illegible]OJOAQUE	283.415	125.300	253.500	20.000	65.000	76.000	0.000	0.000	149.854	0.000	209.250	1,182.319	$2,571,544
PORTALES	34.665	200.200	235.250	74.000	111.000	124.000	0.000	0.000	174.896	0.000	112.621	1,066.632	$2,319,925
QUEMADO	0.000	14.700	37.750	4.000	5.000	2.000	0.000	0.000	227.532	0.000	11.025	302.007	$656,865
QUESTA	136.085	33.600	54.250	8.000	27.000	16.000	0.000	0.000	430.816	0.000	88.879	794.630	$1,728,320
RATON	44.750	76.300	178.750	56.000	67.000	54.000	0.000	0.000	150.235	0.000	57.996	715.031	$1,555,192
RESERVE	0.000	17.500	21.250	10.000	11.000	12.000	0.000	0.000	241.800	4.000	9.450	327.000	$711,225
RIO RANCHO	99.000	517.300	1,394.500	172.000	176.000	856.000	0.000	4.000	0.000	1,178.000	634.838	5,029.638	$10,939,483
ROSWELL	405.250	1,064.000	1,502.000	348.000	512.000	488.000	0.000	0.000	0.000	0.000	625.393	4,954.643	$10,776,349
ROY	0.000	14.000	20.250	6.000	1.000	0.000	0.000	0.000	141.189	2.250	1.695	186.384	$405,342
RUIDOSO	62.915	202.300	403.250	98.000	75.000	170.000	0.000	0.000	191.758	0.000	195.289	1,398.512	$3,041,764
SAN JON	0.000	25.200	3.250	10.000	0.000	8.000	0.000	0.000	204.539	1.500	3.693	256.382	$557,631
SANTA FE	337.835	1,023.400	1,307.250	126.000	335.000	834.000	0.000	0.000	147.106	78.000	918.298	5,108.889	$11,111,834
SANTA ROSA	202.585	70.000	148.750	22.000	21.000	60.000	0.000	0.000	383.619	0.000	98.298	986.252	$2,145,098
SILVER CITY	347.250	215.600	334.500	52.000	257.000	232.000	0.000	0.000	227.547	0.000	281.673	1,947.570	$4,235,965
SOCORRO	19.585	118.300	129.000	64.000	123.000	112.000	0.000	2.000	248.685	12.750	192.453	1,019.833	$2,218,137
SPRINGER	0.000	[illegible]00	61.000	14.000	5.000	8.000	0.000	0.000	273.834	0.000	9.878	396.312	$888,329
TAOS	323.915	[illegible]30	342.000	108.000	120.000	260.000	0.000	0.000	166.883	0.000	325.684	1,874.642	$4,077,346
TATUM	13.500	[illegible].00	22.500	70.000	37.000	24.000	0.000	0.000	249.118	0.000	20.664	466.882	$1,015,468
TEXICO	1.665	[illegible]100	52.250	28.000	16.000	12.000	0.000	0.000	277.833	0.000	38.645	466.293	$1,018,537
TRUTH OR CONS.	30.585	98.000	154.750	80.000	125.000	130.000	0.000	0.000	198.028	0.000	143.982	960.345	$2,088,750
TUCUMCARI	10.250	85.400	114.250	70.000	47.000	182.000	0.000	0.000	320.928	0.000	132.042	961.870	$2,092,067
TULAROSA	11.415	112.700	163.250	58.000	61.000	76.000	0.000	0.000	229.397	0.000	131.158	852.920	$1,855,101
VAUGHN	0.000	15.400	35.500	6.000	7.000	4.000	73.278	0.000	131.774	0.000	14.495	287.447	$625,197
WAGON MOUND	10.500	9.100	36.750	2.000	0.000	112.000	6.388	0.000	184.994	0.000	25.395	387.125	$798,497
ZUNI	377.250	112.000	116.000	30.000	87.000	100.000	0.000	0.000	307.142	16.500	236.083	1,363.975	$2,966,648
	16,382.755	22,697.500	38,704.500	7,360.000	12,240.000	24,328.000	141.138	16.000	18,375.135	1,724.750	23,641.572	165,611.348	$360,204,692

ATTACHMENT 2

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

Honorable Michael J. Davis
Superintendent of Public Instruction
Department of Education Building
New Mexico State Department of Education
Sante Fe, New Mexico 87501-2786

Dear Superintendent Davis:

Enclosed is a certification and related report confirming that New Mexico meets the requirements of Section 8009(b) of the Elementary and Secondary Education Act 1965 (20 U.S.C. § 7709) and is eligible to consider a portion of Impact Aid payments as local resources in determining State aid entitlements for the period July 1, 1999 -June 30, 2000(fiscal year 2000)

A copy of the certification and report is being sent to all school districts in New Mexico to inform them of their right to a hearing.

Sincerely,

/s/
Catherine Schagh, Director
Impact Aid Program

Enclosures

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND SECONDARY EDUCATION

NOTICE OF CERTIFICATION UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (20 U.S.C. § 7709(b))

State — New Mexico

Period of Certification —July 1, 1999- June 30, 2000

As further described in the enclosed report, we have determined that New Mexico is eligible to take into consideration Impact Aid payments in determining State aid to local educational agencies in accordance with section 8009(b) of the Elementary and Secondary Education Act of 1965, as amended by the Improving America's Schools Act of 1994 (20 U.S.C. § 7709(b)) for the period noted above.

Any local educational agency adversely affected by this action may request, in writing and within 30 days of the receipt of this notice, a hearing under section 8009(c)(3)(B) and 34 C.F.R. § 222.165. A request for a hearing should be sent to: Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244.

/s/
Catherine Schagh, Director
Impact Aid Program

Enclosure

REPORT FOR THE YEAR JULY 1, 9999–JUNE 30, 2000 (STATE FISCAL YEAR 2000) UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 AS AMENDED BY THE IMPROVING AMERICA'S SCHOOLS ACT OF 1994 (20 U.S.C. § 7709(b))

State — New Mexico

Section I. Background

A. Procedural History

By letter dated February 10, 1999, the Director, School Budget Planning Unit, Department of Education, State of New Mexico (State) notified the U.S. Department of Education (Department) and all Impact Aid applicants in the State of its intention to take Impact Aid payments into consideration in the calculation of State school aid for the period of July 1, 1999 - June 30, 2000 (State fiscal year (FY) 2000). The Department received final FY 1998 data from the State in support of the request for certification under section 8009(b) on February 22, 1999.

On April 13, 1999,the Department notified all local educational agencies (LEAs) in the State of their opportunity to request a hearing concerning the State's request. The Department received one request for a predetermination hearing; however, the LEA withdrew the request. This determination is based upon the data submitted by the State.

B. State School Finance Formula

The current public school funding formula used by the State was first implemented in 1974 and has been revised since then

to make adjustments to the original formula and add new factors related to the educational needs of students and school districts in the State. However, it is essentially the same as it was when first adopted. The formula guarantees each school district 100 percent of a calculated program cost (need), regardless of the district's wealth. All districts levy a 0.5 mill general operational tax, but the vast majority (approximately 90 percent) of funds come from the State Equalization Guarantee and other State contributions.

The first step in the funding formula is to calculate each district's program cost. An instructional unit count is calculated for each district by adjusting the actual student membership by weighting factors that are associated with special categories of needs. The categories include early childhood education, grade levels of students, special education students, bilingual students, students considered to be at risk, district size and sparsity, growth factors and an index for instructional staff experience and training. The district's program cost is then determined by multiplying the district's instructional units by a set dollar figure per unit, which is established by the legislature.

Once each district's need is determined, most of the district's local revenues are Subtracted and the difference is the State's funding share for each district. New legislation enacted effective June 18, 1999 allows the State to consider 75 percent of eligible local resources of revenue and eligible Impact Aid funds. Of the remaining 25 percent, 5 percent will be available to the receiving district for operational use, and the remaining 20 percent will be set aside for capital outlay. Revenues subtracted from a district's need include 75 percent of the revenue raised from the 0.5 mill levy, 75 percent of Federal forest reserve funds and most of the district's Impact Aid receipts.

Section II. Description of Disparity Calculation

A. Disparity Test

A State may take into consideration Impact Aid payments in calculating State aid under section 8009(b) if the Secretary determines that the amount of per-pupil expenditures or revenues of the LEA with the highest per-pupil expenditures or revenues in the State did not exceed the per-pupil expenditures or revenues of the LEA with the lowest per-pupil expenditures or revenues by more than 25 percent. 20 U.S.C.§ 7709(b)(2)(A). As described below, New Mexico has satisfied this requirement for FY 2000.

In making this determination, we disregarded LEAs with expenditures or revenues above the95th percentile or below the 5th percentile of such revenues or expenditures in the State as required by the statute. See 20 U.S.C. § 7709(b)(2)(B)(i). As required by section 8009(b)(2)(ii), we also took into account the extent to which the State's program reflects the additional cost of providing free public education in particular types of LEAs or to particular types of students. First, we examined the weights used by the State in calculating instructional units to determine which of them qualify to be taken into account under section 8009(b)(2)(ii) and 34 C.F.R. § 222.162(c)(2). Only the additional allocations for Special Education, Bilingual Education, district size, growth and new district adjustments were considered to meet these standards. They were taken into account by excluding the revenues for these additional costs from the determination, as provided in 34 C.F.R. § 222.161(c)(3)(iii).

B. Fiscal year 1997 Data in Support of 1999 Request

According to the State's February 22, 1999, data, the revenue

per-pupil at the 95th percentile was $3,259.00 (Penasco) and the per-pupil revenue at the 5th percentile was 52,848.00 (Hobbs). The resulting disparity was 14.43 percent.

Section III. Findings

A. Based upon final FY 1998 data received by the Department on February 22, 1999, the New Mexico State aid formula is certified under section 8009(c)(3) for FY 2000. The revenue disparity is 14.43 percent, which is within the 25 percent disparity allowed under section 8009(b)(2).

B. Therefore, the State is certified to take into consideration Impact Aid payments when calculating State aid to districts for FY 2000. The State may not take into consideration the increased payment that results from the use of a weight of greater than 1.0 under subparagraph (B) of section 8003(a)(2) of the Act (children residing on Indian lands) or supplemental payments under section 8003(d) of the Act (children with disabilities), section 8003(f) of the Act (heavily impacted LEAs) and section 8003(g) of the Act (LEAs with high concentrations of children with severe ...disabilities). See 20 U.S.C. § 7709(b)(1). In addition, the State may not take into consideration increases in payment under the following subsections of 3(d) of the Act of September 30, 1950 (Pub. L. 81-874): Sections 3(d)(2)(B) (increases for heavily impacted local educational agencies); 3(d)(2)(C) (increases for handicapped, children and children with specific learning disabilities); 3(d)(2)(D) (increases for children residing on Indian lands); and 3(d)(3)(B)(ii) (increases for unusual geographical factors). The maximum proportion of payments that may be taken into consideration, calculated under section 8009(d)(1) for

each LEA, is available upon request from the State.

Report Prepared By: /s/ _____ 11/5/99
Carroll U. Dexter Date
Group Leader
Impact Aid Program

Report Accepted By: /s/ _____ 11/5/99
Catherine Schagh Date
Director
Impact Aid Program

ATTACHMENT 3

ZUNI PUBLIC SCHOOL DISTRICT #89

SUPERINTENDENT
Dr. David L. Cockerham

BOARD OF EDUCATION
Mr. Malcolm Bowekaty
Ms. Shelly C. Chimoni
Mrs. Margaret E. Garcia
Mrs. Carmelita A. Sanchez
Mrs. Ruby Wolf

October 25, 1999

Catherine Schagh, Director
Impact Aid Program
U.S. Department of Education
600 Maryland Avenue SW, Portals Rm. 4200
Washington, DC 20202-6244

Dear Ms. Schagh,

I would like to request; a hearing on the funding of Title VIII Impact Aid for the Zuni Public Schools, and the way the funding formula is distributed in our state.

Section 8009. State Consideration of Payments in Providing State Aid.

(B) OTHER FACTORS — In making a determination under the subsection, the Secretary shall —

(i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State;

It is my interpretation that this means New Mexico can only

take out the top 5% of the school districts (local educational agencies) and the bottom 5% of the school districts (local educational agencies). There are 89 school districts in New Mexico. Taking this into consideration, New Mexico State Department of Education can take five districts from the top and five districts from the bottom. In doing this, the state of New Mexico does not meet the 25% disparity. (See the enclosed New Mexico State Department of Education listing.)

The state of New Mexico is taking credit for kindergarten students from Title VIII Impact Aid funds at the full-time rate and reimbursing our district at a half time rate. Last year's Title VIII Impact Aid rate for Zunf Public Schools was about $2,800. The State of New Mexico reimburses the Zuni Public School District through the state equalization for one kindergarden student at a rate of $1,660.

In the allocation of state funds a state must take into consideration the vast difference in the amount Zuni Public Schools can raise in taxes. This is a great disparity. We need to be able to use our Impact Aid Program money to help us educate our students, build to outdated school facilities, renovate existing facilities, and acquire much needed equipment for our district. Redistributing our federal funds can address these needs in addition to helping all New Mexico districts.

I am looking forward to hearing from you.

Sincerely,

/s/
Dr. David L. Cockerham
Superintendent

ATTACHMENT 4

GALLUP-McKINLEY COUNTY PUBLIC SCHOOLS
GALLUP, NEW MEXICO 87305-1318

ROBERT GOMEZ
SUPERINTENDENT

ANGELO DiPAOLO
ASSISTANT TO THE SUPERINTENDENT

November 8, 1999

Catherine Schagh, Director
Impact Aid Program
United States Department of Education
600 Independence Avenue, SW
Washington, DC 20202-6244

Dear Ms. Schagh:

The Gallup-McKinley County School District requests a hearing on the New Mexico state application for equalized funding. Under contention is the following:

> Section 8009— Federal Register
> 222.163 The state may reduce state aid in a limited amount equal to a specified portion of certain Impact Aid receipts. Specifically, the proportion established by section 8009(d) is the proportion that the local tax revenues covered under the equalization program are of total local tax revenues attributable to current expenditures.

New Mexico statutes have reduced property tax limits to .5 mil levy which produces only$245,774 for educational use. Therefore, the State of New Mexico cannot claim over said amount.

Thank you for your consideration.

Sincerely,

/s/_____
Robert Gomez
Superintendent

Enclosure

[FOLD OUT EXHIBITS]

State of New Mexico
Public School Approved Operating Budget
Revenue 1999/2000

Fund Year 2000 District 043 GALLUP
Analyst Beverly Aguilar

Fund	Fnct	Obj					Estimated Amount	Operating Budget Amount
11000		8101	Resident'l/Non-Resident'l Taxes					
			Residential Taxes	145,715,495.00	X	.000259	245,756	245,169
			Non-Residential Taxes	414,857,900.00	X	.000500	37,740	
			Sub-Total	560,573,395.00	X		207,429	
		8103	Oil & Gas Taxes				245,169	
			Oil & Gas Taxes					
			Total Assessed Valuation:	1,209,198.00	X	.000500	331	605
				561,782,593.00	X		605	
			SUBTOTAL ASSESSED VALUATION				245,774	
							246,087	245,774
		8201	Fees-Activities					
		8202	Fees-Educational					
		8205	Fees-Users				148	
		8302	Rent and Leases				56,628	0
		8303	Sale of Pers./Real Prop./Equip.				121	75,000
		8304	Sale of Pers. Prop./Equipment				19,551	0
		8307	Insurance/Individual Recoveries				26,697	20,000
		8312	Refunds Prior Year				0	5,000
		8313	Interest				17,464	2,000
							41,753	5,000
			SUBTOTAL LOCAL REVENUE				800,000	0
							1,208,449	800,000
		8501	State Equalization Guarantee				33,708,235	1,152,774
		8512	State Flowthrough Indirect Costs				2,500	38,767,156
			SUBTOTAL STATE REVENUE				33,710,735	4,600
								38,771,756
		8603	Impact Aid				20,555,637	
		8604	Forest Reserve				9,470	20,555,637
		8605	Federal Flowthrough Indirect Costs				145,370	9,470
		8607	Federal Direct Indirect Costs				112,355	165,022
			SUBTOTAL FEDERAL REVENUE				20,822,832	112,000
								20,842,129
		8912	Restricted 20% Revenue				0	
			SUBTOTAL Restricted Revenue				0	4,162,176-
								4,162,176-
			SUBTOTAL OPERATIONAL				55,742,016	56,604,483
		9111	Unrestricted Cash				2,769,561	
		9112	Restricted Cash				86,069	2,414,999
			SUBTOTAL CASH				2,855,630	33,986
								2,448,985

Revenue/20

Attachment 5

GALLUP/MCKINLEY COUNTY SCHOOL DISTRICT (GMCS)
STIPULATED FACT SHEET #1

CHOOL YEAR	GENERAL COUNTY SCHOOL TAX	STATE SCHOOL TAX IN GMCS DISTRICT	STATE SCHOOL TAX RATE	GMCS PL874 RECEIPTS	STATE CREDIT OF GMCS PL874 RECEIPTS	STATEWIDE PL874 RECEIPTS
964-1965	244,272		2.125	807,292		6,542,163
965-1966	253,889		2.125	969,691		7,474,393
966-1967	258,574		2.125	1,061,804		8,220,207
967-1968	269,981		2.125	928,455		7,428,664
968-1969	353,742		2.225	1,258,780		8,400,844
969-1970	407,678		2.225	1,784,151		9,866,688
970-1971			2.225			
971-1972	456,519		4.450	2,483,083		14,644,866
972-1973	541,349		4.450	3,885,148		19,332,743
973-1974	523,575		4.450	3,293,958		13,911,646
974-1975 *1		883,552	11.150	2,847,648	2,705,266	15,335,943
975-1976		798,128	8.925	3,904,323	3,709,107	16,970,728
976-1977		802,012	8.925	4,723,103	4,486,948	19,960,965
977-1978		1,071,897	8.925	5,785,621	5,496,340	22,629,891
978-1979		1,303,826	8.925	5,918,044	5,622,142	21,801,140
979-1980		1,765,331	8.925	7,899,157	7,504,199	25,238,382
980-1981 *2		2,085,528	4.500	8,472,998	8,049,348	26,353,613
981-1982		791,785	2.500	4,540,146	4,313,139	19,653,627
982-1983		557,505	0.500	9,359,686	8,891,702	32,187,465
983-1984		359,567	0.500	10,391,867	9,871,514	29,285,162
984-1985		216,826	0.500	10,890,689	10,346,079	34,009,741
985-1986		259,578	0.500	10,457,884	9,934,990	34,265,871
986-1987		283,295	0.500	13,339,685	12,672,701	38,110,083
987-1988		197,577	0.500	6,382,161	6,063,053	26,239,152
988-1989			0.500			
989-1990		368,232	0.500	7,651,881	7,269,287	31,628,727
990-1991		249,975	0.500	11,701,342	11,117,225	32,695,249
991-1992			0.500			
992-1993		257,691	0.500	9,868,886	9,375,366	31,213,354
993-1994		267,576	0.500	6,343,947	6,026,750	25,979,514
994-1995		257,469	0.500	9,497,891	9,023,496	28,394,040
995-1996			0.500	11,343,737.87	10,776,551	38,852,116
996-1997			0.500	18,965,548	18,017,271	42,955,792
997-1998			0.500	21,155,895	20,098,100	51,116,363
998-1999			0.500	19,484,889.85	18,510,645	
999-2000			0.500	24,654,010.50	18,490,508 *3	

*1 OF GENERAL COUNTY SCHOOL TAX
*2 NI LEAVES GMCS DISTRICT
*3 ATE REDUCES 95% CREDIT TO 75% AND ALLOWS GMCS TO KEEP 25% WITH 20% DESIGNATED FOR CAPITAL IMPROVEMENTS

APPENDIX G

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF MCKINLEY
STATE OF NEW MEXICO

Case No. CV-98-II

[Filed October 14, 1999]

THE ZUNI PUBLIC SCHOOL DISTRICT and SKYLAR MARTINEZ, by and through his next friends and parents, MALCOLM BOWEKATY and VURLENE BOWEKATY, JEFFREY M. JOHNSTON, by and through his next friends and parents, MADRELL and WILBUR JOHNSTON, ERIQ HASKIE SANCHEZ, by and through his next friends and parents, MARISA SANCHEZ, AMBER DEYSEE, by and through her next friends and parents, CAROLINE AND DEWEY DEYSEE, and CHARLES BOOQUA, JR., by and through his next friends and parents, MARLENE and CHARLES BOOQUA, SR,

Plaintiffs,

THE GALLUP-MCKINLEY SCHOOL DISTRICT NO. 1, THE GRANTS CIBOLA SCHOOL DISTRICT; CHRISTINE JOHNSTON by and through his/her next

friends and parent, GLORIA JOHNSTON; DORETTA LARGO by and through her next friend and parent CHARLES CHIA; TARA LORENZO by and through her next friend and parent DENNIS LORENZO; TROY SANDOVAL by and through his next friends and parents, DION SANDOVAL and JOLYNN WASETA; JUSTIN SUAZO by and through his next friends and parents, RITASUAZO and DALE SUAZO; WILLIAM GARCIA, MATTHEW GARCIA and SARAH GARCIA by and through their next friends and parents, GEORGE GARCIA and ISABEL GARCIA; KYLE NELSON and CHELSEA NELSON by and through their next friends and parents, TOM NELSON and PAM NELSON; and ERIN LEWIS and ERIK LEWIS by and through theirnext friends and parents, MARK LEWIS and MARIE LEWIS,

Plaintiff-Intervenors,

vs.

THE STATE OF NEW MEXICO and MICHAEL DAVIS, State Superintendent of Schools, in his official capacity,

Defendants.

PARTIAL SUMMARY JUDGMENT

This matter having Come before the Court on the Motion

for Partial Summary Judgment against Defendants, THE STATE OF NEW MEXICO and MICHAEL DAVIS, the Court having reviewed said Motion and Briefs submitted by both parties, having heard argument of counsel at the hearing held on June 30, 1999, and being fully advised in the premises, finds that said Motion is well taken and farther finds as follows:

1. The Plaintiffs and Plaintiffs/Intervenors are New Mexico school districts and the named students are students within those districts and areproper parties to bring this action.

2. Article XII, Section 1 of the New Mexico Constitution provides:

   A uniform system of free public schools sufficient for the education of, and open to, all children of school age in the State of New Mexico shall be established and maintained.

3. The current system for the funding of capital improvements for New Mexico's school districts violates Article XII, Section 1 of the New Mexico Constitution.

4. The ability of a school district to fund capital improvements is largely based upon the value of real property located within the district available to be taxed.

5. The ability of school districts to raise these capital improvement funds differs among districts because of the non-taxable nature of certain lands within school districts and the differing taxable values of lands

within the school districts and creates a lack of uniformity of funding capital improvements.

6. There is no state interest which justifies the current inequality in the ability of districts to fund capital improvements.

7. There are no genuine issues of material fact as to the current statutory method for raising capital improvement funds or as to the mandates of Article XII, Section 1 of the New Mexico Constitution.

8. There has been no showing that there are any possible conflicts of material facts which might develop as a result of any discovery which has not occurred, as the Defendants have all necessary information concerning the finances and abilities of the various districts to raise funds for capital improvements.

9. As the material facts are undisputed and only legal interpretation of facts remains, summary judgment is appropriate.

10. The Plaintiffs and Plaintiff-Intervenors are entitled to judgment as a matter of law.

11. This Partial Summary Judgment involves controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal may materially advance the ultimate termination of this litigation.

It Is Therefore, By The Court, Ordered, Adjudged And Decreed as follows:

1. The Court has jurisdiction over the parties and the subject matter hereto.

2. The current system for funding capital improvements within New Mexico's school districts violates Article XII, Section 1 of the New Mexico Constitution.

3. The Defendants' request that a ruling on this Motion for Partial Summary Judgment be delayed until further discovery is conducted is ~~without merit~~ and is denied.

4. Plaintiffs' and Plaintiff-Intervenors' Motion for Partial Summary Judgment is granted.

5. The Defendants shall have until July 28, 2000, in which to establish and implement a uniform funding system for capital improvements for New Mexico school districts and for correcting existing past inequities, all to be within the mandates of Article XII, Section 1 of the New Mexico Constitution.

6. The Court reserves the right to hold status conferences on its own initiative or on the motion of any party as to the progress of establishment and implementation of this new funding system prior to July 28, 2000.

7. This Court shall review the plan developed by Defendants and may later impose further appropriate sanctions or conditions for failure to establish and implement an adequate and constitutional funding system.

8. ~~The Defendants shall not retaliate against Plaintiffs in any manner for the filing and prosecution of this action.~~

9. The Court reserves jurisdiction of all remaining issues not disposed of by this Judgment.

10. Defendants are entitled to an immediate appeal pursuant to § 39-3-4, N.M.S.A., 1978 Comp.

/s/
Joseph L. Rich,
District Judge

APPROVED AS TO FORM:

/s/
Bennett Cohn, Director Civil Litigation
Office of the Attorney General
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SUBMITTED BY:

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BOYNTON & SIMS WEST

By /s/_____

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APPENDIX H

IMPACT AID DISTRIBUTIONS TO NM DISTRICTS
1999-2000 Actual Receipts

Source: New Mexico Public School Finance Statistics Published by NM Department of Education, Fiscal Year 1999-2000 Actual

DISTRICT	RECEIPTS		TOTAL
Name	Operational	Capital	Receipts
Alamagordo	$1,627,364	$406,841	$2,034,205
Albuquerque	$489,469	$122,367	$611,836
Bernalillo	$2,809,874	$702,468	$3,512,342
Bloomfield	$470,269	$117,567	$587,836
Central	$14,693,773	$3,673,443	$18,367,216
Cloudcraft	$2,172	$543	$2,715
Clovis	$342,957	$85,739	$428,696
Cuba	$1,233,109	-	$1,233,109
Dulce	$1,731,284	$432,821	$2,164,105
Espanola	$37,551	$8,264	$45,815
Farmington	$65,599	-	$65,599
Gallup	$18,013,031	$4,479,160	$22,492,191
Grants	$542,584	$155,881	$698,465
Jemez Mountain	$6,366	$1,592	$7,958
Jemez Valley	$433,066	$108,116	$541,182
Las Cruces	$76,398	$19,100	$95,498
Las Vegas-West	$2,192	-	$2,192
Los Alamos	$226,261	$56,565	$282,826
Los Lunas	$58,922	$14,730	$73,652
Magdalena	$400,113	$99,186	$499,299

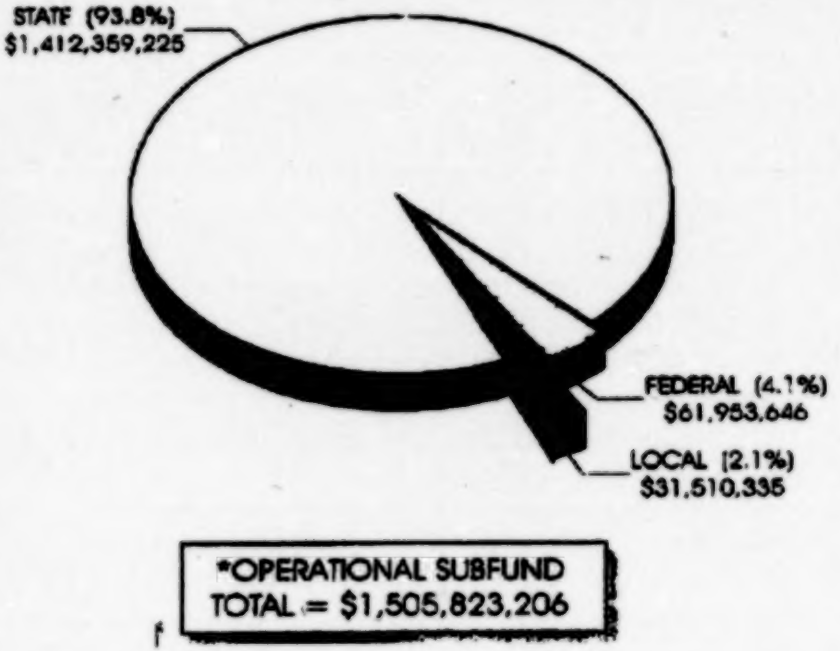
DISTRICT	RECEIPTS		TOTAL
Name	Operational	Capital	Receipts
Maxewell	$804	-	$804
Pecos	$172	$43	$215
Penasco	$12,044	$3,011	$15,055
Pojoaque	$745,955	$186,488	$932,443
Raton	$1,184	$296	$1,480
Ruidoso	$759,923	-	$759,923
Santa Fe	$921	$230	$1,151
Taos	$35,534	$8,883	$44,417
T of C	$106	-	$106
Zuni	$5,987,091	$1,182,318	$7,169,409

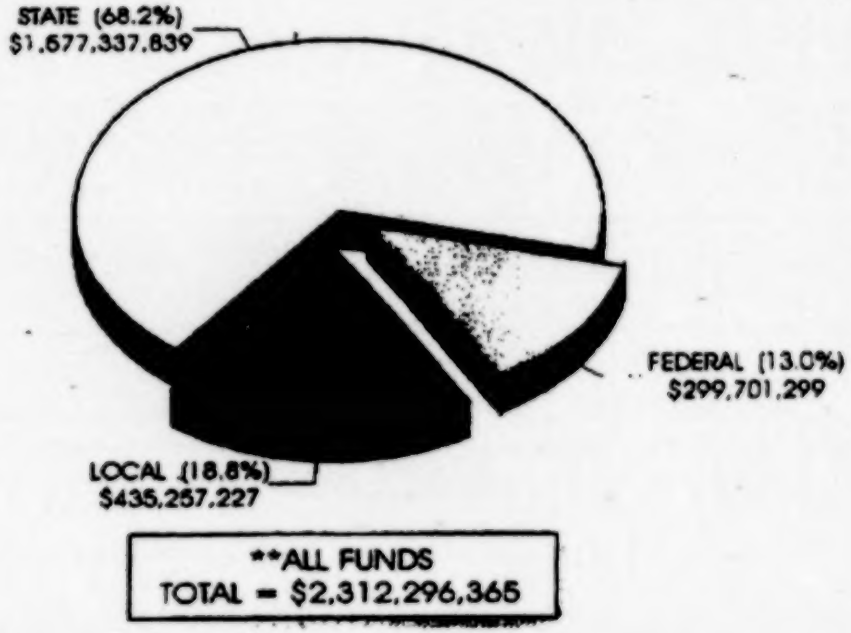
APPENDIX I

1999-2000 ACTUAL RECEIPTS

[FOLD OUT EXHIBIT]

1999-2000 ACTUAL RECEIPTS





NOTES:
*The Operational Subfund total does not include $2,999,923 in abatements.
**Totals do not include $5,267,065 in abatements, donated commodities, and deferred sick leave accumulation.
SOURCE: 1999-2000 District Actual Receipts Report. (Does not include RCC/REC receipts).

APPENDIX J

SCHOOL BUDGET & FINANCE ANALYSIS BUREAU

TRAINING AND EXPERIENCE INDEX AND RANKING 2005-2006 FISCAL YEAR

DISTRICT	RANK	10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E
Alamogordo	43	1.117
Albuquerque	58	1.091
Animas	1	1.316
Artesia	19	1.173
Aztec	47	1.111
Belen	76	1.063
Bernalillo	21	1.168
Bloomfield	49	1.107
Capitan	40	1.119
Carlsbad	3	1.269
Carrizozo	12	1.190
Central	34	1.139
Chama	29	1.151
Cimarron	13	1.189
Clayton	30	1.149
Cloudcraft	25	1.154
Clovis	61	1.087
Cobre	17	1.178
Corona	81	1.051
Cuba	40	1.119
Deming	66	1.080

DISTRICT	RANK	10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E
Des Moines	27	1.152
Dexter	72	1.070
Dora	4	1.242
Dulce	85	1.046
Elida	72	1.070
Espanola	53	1.104
Estancia	63	1.085
Eunice	79	1.055
Farmingham	54	1.100
Floyd	80	1.054
Fort Sumner	10	1.197
Gadsden	77	1.061
Gallup	82	1.050
Grady	59	1.090
Grants	21	1.168
Hagerman	78	1.059
Hatch	30	1.149
Hobbs	68	1.080
Hondo	57	1.092
House	86	1.029
Jal	23	1.167
Jemez Mountain	65	1.084
Jemez Valley	36	1.138
Lake Arthur	88	1.000
Las Cruces	69	1.076
Las Vegas City	34	1.139
Logan	5	1.226
Lordsburg	75	1.068
Los Alamos	20	1.172
Los Lunas	44	1.114
Loving	24	1.161

DISTRICT	RANK	10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E
Lovington	47	1.111
Magdalena	37	1.136
Maxwell	14	1.185
Melrose	27	1.152
Mesa Vista	39	1.130
Mora	25	1.154
Moriarty	51	1.105
Mosquero	84	1.048
Mountainair	33	1.142
Pecos	37	1.136
Penasco	16	1.179
Pojoaque	70	1.074
Portales	68	1.077
Quemado	63	1.085
Questa	15	1.082
Raton	46	1.112
Reserve	18	1.174
Rio Rancho	72	1.070
Roswell	62	1.086
Roy	51	1.105
Ruidoso	8	1.206
San Jon	6	1.224
Santa Fe	71	1.071
Santa Rosa	32	1.146
Silver	7	1.211
Socorro	83	1.049
Springer	87	1.023
Taos	44	1.114
Tatum	2	1.271
Texico	9	1.203
Truth or Conseq.	60	1.089

DISTRICT	RANK	10/04 INDEX FOR 2005-2006 FUNDING UNAUDITED T&E
Tucumcari	54	1.100
Tularosa	11	1.191
Vaughn	50	1.106
Wagon Mound	56	1.097
West Las Vegas	42	1.118
Zuni	49	1.107
STATEWIDE		1.100

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JUL 31 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 05-1508

In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, ET AL.,
PETITIONERS

v.

DEPARTMENT OF EDUCATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The federal Impact Aid statute, 20 U.S.C. 7701 *et seq.*, provides funds to local school districts that have a substantial federal presence within the district. The Impact Aid program generally prohibits a State from considering federal impact aid received by local school districts when allocating state funds among school districts in the State. 20 U.S.C. 7709(a). If, however, the Secretary of Education certifies that the State's funding system is "equalize[d]" within the meaning of the statute, 20 U.S.C. 7709(b) (2000 & Supp. III 2003), the State may consider federal impact aid funds received by a school district when allocating state funds among school districts. The question presented is as follows:

Whether the methodology used by the Secretary in determining whether a State's funding system is equalized is based on a permissible interpretation of the Impact Aid statute, 20 U.S.C. 7709(b) (2000 & Supp. III 2003).

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In the Supreme Court of the United States

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BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The per curiam opinion of the court of appeals (Pet. App. 1a-2a) is reported at 437 F.3d 1289. The panel opinion of the court of appeals (Pet. App. 3a-33a) is reported at 393 F.3d 1158. The decision of the Secretary of Education (Pet. App. 34a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2006. The petition for a writ of certiorari was filed on May 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners, Zuni Public School District No. 89 (Zuni) and Gallup-McKinley County Public School District No. 1 (Gallup-McKinley), are two New Mexico local educational agencies (LEAs) that receive federal financial assistance under what is commonly known as the Impact Aid program. 20 U.S.C. 7701 *et seq.* The Impact Aid program provides assistance to local school districts in which the federal government's tax-exempt ownership of real property limits the property tax base, or to school districts obligated to serve pupils who live on federal property (including Indian lands) or whose parents work on federal property. See 20 U.S.C. 7701-7714 (2000 & Supp. III 2003).

To assure that LEAs adversely affected by a federal presence obtain the full intended benefit of impact aid funding, the impact aid statute generally bars a State from considering the federal impact funding an LEA receives when distributing state aid to school districts. 20 U.S.C. 7709(a). If, however, the Secretary certifies that a State has a program of aid "that equalizes expenditures for free public education among local educational agencies in the State," the State may consider impact aid when distributing state aid to its school districts. 20 U.S.C. 7709(b)(1) (2000 & Supp. III 2003). Congress recognized that, in the situation of a State with equalized education funding among LEAs, barring the State from considering impact aid to individual school districts would impair the ability of the State to equalize disparities in wealth among school districts. See H.R. Rep. No. 805, 93d Cong., 2d Sess. 42 (1974).

2. a. Initially, Congress left the task of determining whether a State operates an effective equalization pro-

gram almost entirely to the Secretary's discretion. See 20 U.S.C. 240(d)(2)(B) (Supp. IV 1974) (Pet. App. 70a). In 1976, after engaging in notice and comment rulemaking, the Secretary promulgated regulations providing that a State would be deemed "equalized" if the disparity in per-pupil revenues or expenditures among the State's LEAs was no more than 25%. See 41 Fed. Reg. 26,320, 26,327 (1976). The specific methodology the Secretary would follow in making a disparity determination was set forth in Appendix A to the regulation.

First, the Secretary ranked LEAs by per-pupil expenditures or revenues. Next, the Secretary identified those LEAs that fell "at the 95th and 5th percentiles of the total number of pupils in attendance in the schools" of the State's LEAs. 41 Fed. Reg. at 26,329 (Pet. App. 159a-160a). The per-pupil expenditures or revenues of those two LEAs were then compared to determine whether the disparity exceeded 25%. *Ibid.*; *id.* at 26,327. The effect of comparing those two LEAs was essentially to calculate the disparity among those LEAs whose pupils accounted for the central 90% of the overall pupil population along the spectrum of LEAs (as ranked by per-pupil expenditures or revenues), and correspondingly to exclude from consideration those LEAs whose pupil populations accounted for the 5% of the overall pupil population that lay at each end of the spectrum of LEAs.[1]

---

[1] Because the Secretary's methodology treats each LEA as an indivisible unit when determining which LEAs to exclude, the methodology would result in excluding those LEAs that account for *approximately* 5% of the pupil population at either end of the spectrum, rather than excluding exactly 5% of the pupil population at either end of the spectrum.

In the course of the notice and comment rulemaking process, the Secretary considered and rejected the suggestion that, instead of excluding those LEAs at either end of the spectrum whose pupils accounted for 5% of the total pupil population, the Secretary instead should exclude 5% of the *LEA*s at either end of the spectrum, regardless of the number of pupils served by those LEAs. The Secretary prescribed that the "percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts." 41 Fed. Reg. at 26,324. The Secretary explained:

> [I]t is the [Secretary's] view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. * * * In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

Ibid. In 1993, the 1976 regulations were codified with essentially the same language at 34 C.F.R. 222.63 (1993) and 34 C.F.R. Pt. 222, Subpt. K, App. (1993).

b. Congress amended the Impact Aid statute in 1994, for the first time codifying statutory standards concerning the determination whether a State operates an equalized program. The statute, as amended, calls for the Secretary to continue to apply a 25% disparity test to those LEAs that remain after applying 95th and 5th percentile exclusions. See 20 U.S.C. 7709(b)(2). In

particular, the statute prescribes that state funding is "equalize[d]" if "the amount of per-pupil expenditures made by, or per-pupil revenues available to, the [LEA] in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the [LEA] in the State with the lowest such expenditures or revenues by more than 25 percent." 20 U.S.C. 7709(b)(2)(A). The statute further prescribes that, in making that calculation, the Secretary shall "disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). That language concerning the 95th and 5th percentiles varies slightly from the corresponding language that was in the appendix to the regulations at the time of the statutory amendment. See 34 C.F.R. Pt. 222, Subpt. K, App. (1993) (basing 25% calculation on the two LEAs that fall "at the 95th and 5th percentiles of the total number of pupils in attendance" in the State's LEAs).

After the 1994 amendments, the Secretary issued a new regulation that essentially mirrored the new statutory language. See 34 C.F.R. 222.162(a) (1996). In an appendix, the new regulation detailed the precise methodology for applying the disparity test, which retained the same methodology for implementing the 95th and 5th percentile exclusions that had been outlined in the previous appendix to the regulations.

3. For Fiscal Year 2000, the Assistant Secretary for Elementary and Secondary Education certified that the State of New Mexico operated an equalized program pursuant to 20 U.S.C. 7709(b) and the corresponding regulations at 34 C.F.R. 222.162. Pet. App. 41a-42a.

Petitioners contested the certification, and an administrative law judge issued a decision sustaining the Assistant Secretary's certification. *Id.* at 43a-58a.

Petitioners appealed the ALJ's decision to the Secretary, who affirmed the ALJ's decision. Pet. App. 34a-40a. The Secretary explained that, "[a]lthough the impact aid statute sets forth the parameters for calculating state public education or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test." *Id.* at 37a. Congress instead had "left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR Part 222." *Ibid.* The Secretary concluded that there "is nothing within the text of the statute that precludes [the regulatory] interpretation or *requires* another result." *Id.* at 39a.

4. Petitioners filed a petition for review in the court of appeals. Petitioner Zuni contended that the Secretary's methodology for determining which LEAs to exclude under the 95th and 5th percentile provision, 20 U.S.C. 7709(b)(2)(B)(i), conflicts with the statute. According to Zuni, the statute precludes the Secretary from considering the number of pupils served by each LEA in applying the 95th and 5th percentile exclusions, and thus bars the Secretary from excluding those LEAs at either end of the spectrum that account for 5% of the overall pupil population in the State. Zuni argued that the Secretary instead is required to apply one of two alternative methodologies: (i) eliminate 5% of the LEAs that are at either end of the spectrum, regardless of how many pupils are served by those LEAs; or (ii) calculate 95% of the per-pupil expenditures or revenues for the LEA with the highest per-pupil expenditures or revenues and eliminate any LEA whose per-pupil expendi-

tures or revenues is above that amount, and implement a corresponding exclusion of LEAs at the low end of the spectrum. See Pet. App. 15a. Either of those methodologies, if applied to New Mexico, would result in a remaining list of LEAs for which the disparity between the highest and lowest level of per-pupil expenditures or revenues would exceed 25%, such that New Mexico would fail to qualify as equalized. See *id.* at 15a n.7.

a. A panel of the court of appeals affirmed the Secretary's decision, rejecting petitioners' contention that the Secretary's methodology is precluded by the Impact Aid statute. Pet. App. 3a-33a. The panel reasoned that the "statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test," required that deference be accorded to the Secretary's determination under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 16a-17a. The panel concluded that the Secretary's interpretation is reasonable, explaining that it "supports the basic purpose of the percentile exclusion because it eliminates in a fair and effective manner any unusual or noncharacteristic per-pupil revenues or expenditures that may appear at the extremes of the range of LEAs in the state." *Id.* at 17a. The panel explained that Zuni's first suggested alternative approach of eliminating 5% of the LEAs at either end of the spectrum "would not further the goal of eliminating [the] unusual distribution of per-pupil expenditures in New Mexico," which "has predominately small LEAs, several of which rank near the top of per-pupil expenditures." *Ibid.*

Judge O'Brien dissented from the panel disposition. Pet. App. 22a-33a. In his view, the statute unambiguously required a slightly-modified version of Zuni's first

suggested alternate methodology, see *id.* at 24a, according to which New Mexico was not equalized.[2]

b. The court of appeals granted rehearing en banc and vacated the panel opinion. The en banc court affirmed the Secretary's decision by an equally divided court. Pet. App. 1a-2a. The court's per curiam opinion announced that result but contained no further explanation or reasoning. *Id.* at 2a.

ARGUMENT

The court of appeals' judgment affirming the Secretary's decision is correct and does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. As petitioners acknowledge (Pet. 11), the validity of the Secretary's methodology for determining whether a State operates an equalized education funding program under 20 U.S.C. 7709 is governed by the two-step framework prescribed by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). That approach calls for determining (i) whether the statute unambiguously re-

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[2] As petitioner Zuni explained in the court of appeals (Zuni C.A. En Banc Repl. Br. 4), both Zuni's first suggested alternative approach and Judge O'Brien's approach ultimately call for eliminating 5% of the LEAs at either end of the spectrum of LEAs. Because New Mexico has 89 LEAs, the result under either approach would be to eliminate 5 LEAs (or 4.55 of the 89 LEAs) at either end of the spectrum. See Pet. App. 24a, 30a-33a. The lone difference between Zuni's first suggested alternative approach and Judge O'Brien's approach is that Judge O'Brien, as an intermediate step, calculated a value equaling the 5th% and 95th% of the range of per-pupil revenues, and then excluded those LEAs whose per-pupil revenues fell below or above those amounts, respectively. But the ultimate result of that approach was to exclude 5% of the LEAs at either end of the spectrum, consistent with the result under Zuni's first suggested alternative approach. Zuni C.A. En Banc Repl. Br. 4.

solves the interpretive question, and, if not, (ii) whether the agency's interpretation is a permissible one. *Ibid.* Where Congress leaves a gap for an agency to fill, courts are bound to respect the agency's choice so long as that choice is not "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron*, 467 U.S. at 844).

Petitioners contend (Pet. 11-15) that the Secretary's methodology fails under step one of the *Chevron* framework. See *Chevron*, 467 U.S. at 842-843. In petitioners' view, the language of 20 U.S.C. 7709(b)(2)(B)(i) unambiguously prescribes that, when applying the 95th% and 5th% exclusion requirement, the Secretary must exclude the 5% of *LEA*'s that fall at each end of the spectrum of LEAs (as ranked by per-pupil expenditures or revenues), instead of excluding those LEAs at each end of the spectrum that account for 5% of the total *pupil population*. Petitioners' argument lacks merit.

As an initial matter, petitioners' own position in the court of appeals demonstrates that the statute does not unambiguously prescribe a single methodology for applying the 95th% and 5th% exclusions—let alone the particular methodology petitioners now endorse. Petitioner Zuni argued in the court of appeals that, under 20 U.S.C. 7709(b)(2)(B)(i), either of two distinct methodologies would be consistent with the statute. See pp. 6-7, *supra*. And while petitioners now evidently support a third methodology set out by the panel dissent below (see Pet. 10)—which is a slight modification of the first alternative approach presented by Zuni below (see note 2, *supra*)—the second alternative endorsed by Zuni below is materially distinct from the approach petitioners now support. That second alternative (see pp. 6-7,

supra) does not entail excluding the 5% of *LEA*s at either end of the spectrum, but instead calls for calculating 95% of the highest per-pupil expenditures or revenues and eliminating *any* LEAs with a higher level of per-pupil expenditures or revenues (and performing a corresponding calculation at the low end of the spectrum), no matter how many LEAs might thereby be excluded.[3] That alternative, fully supported by petitioners below, thus directly conflicts with petitioners' current assertion that the statute unambiguously requires eliminating a particular "percentile[] of LEAs." Pet. 10, 14.

Even disregarding that petitioners endorsed two distinct methodologies below, there is no merit to petitioners' present contention that the statute unambiguously precludes the Secretary's approach and instead requires excluding the 5% of LEAs that fall at each end of the spectrum. The statute provides that, in assessing whether the disparity in per-pupil expenditures or revenues exceeds 25%, the Secretary shall "disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). That language does not prescribe any specific approach for calculating the "95th percentile or * * * 5th percentile of such [per-pupil] expenditures or revenues in the State," or for determining which LEAs fall above or below those levels. As the Secretary explained in his decision in this case, "[a]lthough the im-

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[3] The disparity calculation varies substantially depending on which of the two alternative methodologies are applied. Under the first alternative, the disparity between the per-pupil expenditures or revenues of the remaining set of LEAs would be 26.93%, whereas the disparity under the second approach would be 117.4%. See Pet. App. 15a n.7.

pact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR 222." Pet. App. 37a.

The Secretary's methodology calls initially for ranking LEAs in descending order according to per-pupil expenditures or revenues. The Secretary then excludes those LEAs with per-pupil expenditures that rank "above the 95th percentile or below the 5th percentile of [per-pupil] expenditures or revenues in the State," 20 U.S.C. 7709(b)(2)(B)(i), basing the percentile cut-offs on the total student enrollment in the State. Nothing in that approach conflicts with the statutory text. To the contrary, the Secretary's methodology restricts the application of the disparity test to those LEAs whose student populations represent the central 90% of per-pupil "expenditures or revenues in the State." *Ibid.* And as the court of appeals explained, basing the percentile cut-offs on total student enrollment "makes sense" because it "eliminates in a fair and effective manner any unusual or noncharacteristic per-pupil revenues or expenditures or that may appear at the extremes of the range of LEAs in the state." Pet. App. 17a.

Petitioners err in arguing (Pet. 10-11, 14) that the statute compels the Secretary to exclude a specific "percentile[] of LEAs" at either end of the spectrum, *i.e.*, the 5% of LEAs that fall at each end of the spectrum. As an initial matter, the statute, contrary to petitioner's argument, does not speak in terms of excluding percentiles "of LEAs." The statute instead calls for excluding LEAs whose per-pupil expenditures or revenues are

above the 95th percentile or below the 5th percentile "of [per-pupil] expenditures or revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). Petitioners' proposed methodology, moreover, always excludes the top and bottom 5% of LEAs, regardless of the proportion of the State's students or the amount of total expenditures or revenues encompassed by those LEAs. Accordingly, as the panel majority explained, in States like New Mexico with a substantial number of small LEAs ranking at the top of per-pupil expenditures, an approach that calls for excluding the top and bottom 5% of LEAs would eliminate only a few of those LEAs from the disparity calculation, even though LEAs that would remain at the top of the spectrum—and that thus would determine the top-end of the range of per-pupil expenditures or revenues when applying the 25% criterion—would account for a very small number of students and a very small share of overall expenditures or revenues. Pet. App. 17a.[4]

Indeed, that was precisely the reason that the Secretary originally rejected a methodology that would exclude a specific number (or percentile) of LEAs, without taking into account the number of students served by those LEAs:

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of

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[4] It bears noting that the Secretary's methodology does not systematically favor an equalization finding as compared with petitioners' methodology. If a State faced the converse situation confronted by New Mexico, such that a small number of large LEAs would make up the top (or bottom) of the spectrum, the Secretary's methodology would result in a larger disparity between the highest and lowest non-excluded LEAs than would petitioners' methodology, and thus would more likely lead to a finding of non-equalization.

> the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. 26,324 (1976). By taking into account the number of students enrolled in an LEA, the Secretary's methodology "implements the statute in a manner that will give a more consistent result when applied to a variety of state school systems." Pet. App. 18a.[5]

Petitioners further err in arguing (Pet. 13-14) that the statutory amendments in 1994 precluded the Secretary from continuing to apply the previous methodology. As explained above, nothing in the statutory text expresses a rejection of the Secretary's methodology. To the contrary, the statute codified the fundamental features of the Secretary's approach, prescribing a 25% disparity test with a 5th% and 95th% exclusion requirement. And although the precise wording of the 5th% and 95th% exclusion requirement varied slightly from the Secretary's prior regulatory formulation, see p. 5, *supra*, there is no indication that that slight variation was intended to express rejection of the Secretary's approach. The Secretary's methodology, for those rea-

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[5] The panel dissent acknowledged that the Secretary's "method of handling the 5th/95th percentile exclusion may be the superior one," but believed (erroneously) that the Secretary's method is precluded by the statute. Pet. App. 29a.

sons, is fully permissible according to the *Chevron* framework.[6]

2. The petition also does not warrant review because the effects of the Secretary's methodology are limited. Apart from New Mexico, only two additional States, Kansas and Alaska, claim to be equalized for purposes of applying 20 U.S.C. 7709. And apart from petitioners, no other LEA in any of those three States has objected to the Secretary's methodology. Additionally, the court of appeals below is the only court that has addressed the issue, and even that court's opinion—as an affirmace by an equally divided court—has no precedential effect. In the event that a similar challenge were raised by an Alaska LEA, another court of appeals would then have the opportunity to weigh in on the issue. For those reasons as well, there is no warrant for granting certiorari in this case.

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[6] Although the core of petitioners' submission is that the Secretary's methodology fails at step one of the *Chevron* framework, see Pet. 10-12, petitioners also suggest that the Secretary's methodology fails as an antecedent matter even to implicate the *Chevron* framework because Congress did not delegate the requisite rulemaking authority to the Secretary, see Pet. 13-14 (citing, *inter alia*, *Gonzales* v. *Oregon*, 126 S. Ct. 904 (2006)). The latter argument ultimately collapses into the former one because petitioners' basis for asserting that Congress has failed to delegate authority to promulgate the regulatory methodology at issue is that the methodology is foreclosed by the statutory text. See Pet. 13. The statute, moreover, expressly calls for the Secretary to "mak[e] a determination" of whether a State should be certified as equalized. 20 U.S.C. 7709(b)(2)(B) & (c)(3)-(4). See also 20 U.S.C. 3474 ("The Secretary is authorized to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Department.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, *et al.*,
Petitioners,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether this Court should review the Tenth Circuit Court of Appeal's decision affirming the United States Secretary of Education's application of 34 C.F.R. § 222, a regulation that is consistent with and was promulgated to implement the Impact Aid "disparity test" established under 20 U.S.C. § 7709.

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IN THE

Supreme Court of the United States

No. 05-1508

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, *et al.*,
Petitioners,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION

OPINIONS BELOW

The *per curiam* opinion of the United States Court of Appeals for the Tenth Circuit (Pet. App. 1a-2a) is reported at 437 F.3d 1289 (2006). The initial, and now vacated, opinion of the Tenth Circuit dated December 30, 2004 is reported at 393 F.3d 1158.

The administrative case was docket number 99-81-I. The October 2001 opinion of the United States Secretary of Education (Pet. App. 34a-40a) is reported at 2001 WL 34798131 (EDDS). The April 2001 opinion of the Chief Administrative Law Judge (Pet. App. 43a-58a) is reported at 2001 WL 34402493 (ED.O.H.A.).

STATEMENT OF THE CASE

This proceeding is the Petitioners' attempt to challenge the manner in which the State of New Mexico uses state revenue dollars to voluntarily equalize operational funding in its public schools. In this manner, New Mexico guarantees each of its public school students equal access to programs and services appropriate to individual educational needs regardless of location or local economic conditions. Zuni Public School District No. 89 ("Zuni") and Gallup-McKinley County School District No. 1 ("Gallup") (collectively, the "Petitioners") are local education agencies ("LEAs"), school districts, in the State of New Mexico that receive special funding from the federal government through the Impact Aid program, a program that issues aid to compensate certain school districts for their inability to raise local property tax revenue due to the presence of federal government operations on land within the school district.[1] The law permits states that have been certified as equalized to consider Impact Aid funds that its LEAs receive when determining state allocations to LEAs. In essence, a certified equalized state is allowed to adjust the amount of *state* aid to such districts, in accordance with a federally mandated formula, to account for the receipt of a portion of the federal Impact Aid. The amount of federal Impact Aid the LEAs receive is never affected by this state decision making process which only determines state allocations to its LEAs. As a certified state, New Mexico properly considered the Impact Aid that Petitioners received in making its state allocation determinations.[2]

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[1] The terms "LEA" and "school district" will be used interchangeably throughout this Brief in Opposition.

[2] Year at issue for this case is FY 2000. Petitioners, however, are in the process of challenging the Secretary's certification of the State for every FY since then as well. These cases have been stayed pending the outcome of the Petition.

Understandably, Petitioners would prefer that the Impact Aid they receive not be considered when the State performs its equalization. In that scenario, a greater share of State funds would flow to Petitioners and thus a higher total revenue per student for students attending Petitioners' schools would result. As a consequence, however, a necessarily lower share of State funds would flow to those LEAs not receiving Impact Aid. Further, the unreduced state aid flowing to Petitioners would be partially reimbursing their impacted districts for the same loss of revenue that the Impact Aid is reimbursing, resulting in a double payment.

Petitioners erroneously argue that (1) the United States Secretary of Education (the "Secretary") mis-applied the statutory definition in promulgating interpretive regulations employed in the equalization certification process and that (2) if the statutory definition were properly applied, then the State would not qualify for certification and, accordingly, would not be permitted to take Impact Aid into account in making its allocations to LEAs throughout the State. By Petitioners' argument, the State should allocate more money to Petitioners' districts and, as a consequence of increasing aid to Petitioners' districts, less money to those districts that do not receive Impact Aid. Despite four lower reviews consistently upholding the Secretary's regulation and its application leading to certification, Petitioners seek additional review by this honorable Court.[3]

While Petitioners understandably desire to increase aid to their students, New Mexico's goal is to equalize the total amount spent on students throughout the State, regardless of which LEAs they attend. This is precisely why New Mexico

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[3] The four lower reviews will be discussed in greater detail herein. The first review was conducted by an Administrative Law Judge. The Secretary conducted the second review. The third review was conducted by a Tenth Circuit Court of Appeals three judge panel and the fourth by the Tenth Circuit Court of Appeals on rehearing en banc.

equalizes its education funding, a voluntary State decision, and is also why New Mexico chooses to exercise its right to take Impact Aid into account.[4]

As discussed herein, Petitioners provide no justifiable reason for this Court to grant their Petition for Writ of Certiorari (the "Petition").

1. Statutory and Regulatory Framework. The federal Impact Aid program (20 U.S.C. §§ 7701-7714) provides financial assistance to local education agencies (LEAs) in areas where the federal government has adversely impacted an LEA's ability to provide educational services to school age children. Such adverse impact generally occurs when the LEA's ability to raise local revenues is limited due to the federal government's acquisition of real property (e.g., government buildings, military bases, Indian reservations), or because the LEA provides educational services to a large number of children residing on, or whose parents are employed on, federal property. *See* 20 U.S.C. §§ 7701-7714 et seq.

In general, the law prohibits a state educational agency ("SEA") from considering an LEA's receipt of federal Impact Aid funds (referred to by Petitioners as "taking credit" for the Impact Aid funds (*see e.g.* Pet. at 4)) when determining the amount of financial assistance the State will provide to the LEA. 20 U.S.C. § 7709(a). There is, however, an exception to this general prohibition. An SEA is authorized by the Impact Aid statute to consider an LEA's receipt of federal Impact Aid funds if the Secretary certifies that the SEA has in

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[4] New Mexico's state equalization guarantee funding formula was adopted in 1974 and has been refined and revised in the ensuing years. The underlying principle of educational equity for all students remains the cornerstone of the formula. The record is devoid of any evidence that supports a conclusion that New Mexico's decision to equalize is dependent on the fact that any of its LEAs receive Impact Aid.

effect a program of state aid that equalizes expenditures for free public education among all LEAs in the state. 20 U.S.C. § 7709(b).

In general, a state equalization program allows a state to make up the difference in funding levels for LEAs with lesser abilities to raise revenue. One reason some LEAs face such revenue raising difficulties is due to the same reasons that lead these LEAs to become Impact Aid recipients, i.e., the impact of federal facilities on land within the school district. Impact Aid receiving LEAs, however, are not the only LEAs that face great difficulty raising revenue. Other LEAs also face this problem, but because the reason for their difficulty is not the impact of federal facilities, they do not qualify under the Impact Aid program and therefore do not receive federal Impact Aid.

New Mexico has made the policy determination that the operational funding of its public education system will not be dependent on local resources. If New Mexico were to equalize without taking any notice of the Impact Aid that certain LEAs, such as the Petitioners, receive, those LEAs would virtually receive a double payment. These LEAs would realize the full revenues generated as Impact Aid payments as a result of the negative impact of the federal presence on the local tax base, while also receiving the full amount of the state equalization guarantee.

In essence, if New Mexico were to equalize without taking any notice of the Impact Aid that certain LEAs, such as the Petitioners, receive, those LEAs would receive a double payment. In addition to receiving federal Impact Aid to help compensate for this difficulty, these LEAs would still receive the full amount from the State (amount of equalization), which was designed to equalize regardless of the reason leading to the inequity. Thus, these Impact Aid receiving LEAs would receive double payments, one from the federal government and one from the State, to compensate them for

the same lost revenues due to the impact of a federal presence. Meanwhile, LEAs that do not qualify for Impact Aid but face equal challenges at raising revenue would receive only one payment from the State. Thus, to not take Impact Aid into account would create a great windfall and double payment to Impact Aid districts while leaving behind other revenue struggling LEAs. This is precisely the reason Congress created an exception allowing equalized states to consider Impact Aid in making their state aid determinations.

To determine whether a given state qualifies as operating such an equalized system of public education funding among its LEAs, the statute requires that the Secretary apply what we refer to as the "disparity test." *Id.* Specifically, the statute provides:

> . . . a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. § 7709(b)(2)(A). The statute further requires the Secretary, when making the disparity determination under the above provision, to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B)(i). The statute goes no further in addressing the specifics of how the Secretary is to apply the disparity test. It is the agency's longstanding interpretation of this test that the Petitioners ask this Court to overturn.

Because the statutory provision is open to multiple interpretations and does not provide a precise formula for making the exact disparity calculation, the United States Department of Education (the "Department") promulgated regulations clarifying the statute by detailing the methodology and precise formula for the disparity test. *See* 34 C.F.R. § 222.162(a); 34 C.F.R. pt. 222, subpt. K, app. Specifically, 34 CFR § 222.162(a), taken directly from the statutory language, provides:

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

34 C.F.R. § 222.162(a). The appendix referenced by the regulation (the "Subpart K Appendix") was promulgated through notice-and-comment rulemaking with the main body of the regulation (*see* 60 Fed. Reg. 50,778 (Sept. 29, 1995)), and sets forth the Department's detailed methodology for calculating a State's disparity under 20 U.S.C. § 7709(b). In accordance with the Subpart K Appendix, the Secretary takes the following steps in applying the disparity test:

(1) Rank all LEAs on the basis of current expenditures or revenues per pupil;

(2) Identify the LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and,

(3) Subtract the lower current expenditure or revenue per pupil figure from the higher for those agencies

identified in step (2), and divide the difference by the lower figure.

See 34 C.F.R. pt. 222, subpt. K, app. Then, in accordance with the corresponding statute and regulation, if the resulting figure is 25 percent or less, that state's system qualifies as equalized. 20 U.S.C. § 7709(b)(2)(A); 34 C.F.R. § 222.162(a). The Petitioners contend that this Court should invalidate the Secretary's use of this process to determine equalization and require the Secretary to use a process suggested instead by the Petitioners.

2. Procedural History. On October 5, 1999, the Assistant Secretary for Elementary and Secondary Education, based on the results of the above analysis, certified that New Mexico qualified as an equalized state under section 8009(b) of the Impact Aid law for FY 2000.[5] Accordingly, New Mexico was entitled to consider a portion of the federal Impact Aid funds received by its LEAs when determining state aid for LEAs in the State and making those disbursements for free public education for FY 2000. *See* 20 U.S.C. § 7709(b)(1).

The Department's certification of New Mexico's equalization program has undergone numerous reviews, each review concluding that the Department's certification of the State's voluntary equalization program met the requirements of federal law. Both the administrative law judge (the "ALJ") assigned to hear the case and the Secretary concluded that New Mexico's program complied with the statutory requirements and that the Department correctly certified New Mexico as an equalized state under 20 U.S.C. § 7709(b). Zuni Public School District No. 89, Dkt. No. 99-81-I (Dep't Education Initial Decision April 17, 2001), 2001 WL

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[5] Section 8009(b) of the Impact Aid law is codified at 20 U.S.C. § 7709.

34402493 (ED.O.H.A.) (Pet. App. 43a-58a.); Zuni Public School District No. 89, Dkt. No. 99-81-I (October 11, 2001), 2001 WL 34798131 (EDDS) (Pet. App. 34a-40a). On appeal from the ALJ decision, the Secretary specifically addressed Petitioners' allegation that the regulation at 34 C.F.R. § 222.162(a), including the appendix thereto, failed to properly implement the disparity test set forth at 20 U.S.C. § 7709(b). The Secretary concluded that because the statute is ambiguous and because the regulations are consistent with the statute, the Department's regulatory scheme for determining disparity under 20 U.S.C. § 7709(b) is a reasonable and permissive implementation of the statute and must be upheld. (Pet. App. at 37a-40a.) Regarding the Department's promulgation of a specific methodology for calculating a state's disparity, as set forth in the Subpart K Appendix, the Secretary correctly and unambiguously noted, "There is nothing within the text of the statute that precludes this interpretation or *requires* another result." (Pet. App. at 39a.)

On Petition for Review, a Tenth Circuit panel also considered and upheld the Department's certification of the State's equalization program. *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 393 F.3d 1158 (10th Cir. 2004). (Pet. App. 3a-33a.) After a thorough analysis of the statutory and regulatory scheme, the Tenth Circuit panel also found the statute to be ambiguous, and concluded that the Department's construction of 20 U.S.C. § 7709(b)(2), through its application of the disparity calculation methodology laid out in the regulation, is permissible.[6] *Id.* at 1168. (Pet. App. at 18a-19a.)

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[6] Two of the three judges on the panel endorsed and signed the opinion. The third judge on the panel issued a dissenting opinion in the case. In line with Tenth Circuit Rule 35.6 and as directed by specific order issued by the Tenth Circuit Court of Appeals, those opinions were vacated upon the granting of rehearing en banc.

Next, Petitioners filed a Motion for Rehearing En Banc before the Tenth Circuit, which was granted. After reviewing all briefs filed in the matter and hearing oral argument on the merits, the Tenth Circuit again upheld the Secretary's decision stating that "the decision of the Secretary is affirmed by an equally divided court."[7] *Zuni Pub. Sch. Dist. No. 89 v. U.S. Dep't of Educ.*, 437 F.3d 1289 (10th Cir. 2006) (en banc). (Pet. App. 1a-2a.)

Petitioners now ask the United States Supreme Court to review the Secretary's process for certifying New Mexico's equalization program, a detailed and carefully constructed agency process, which already has been administratively reviewed twice and judicially reviewed twice and consistently upheld on each of these four prior occasions.

ARGUMENT: REASONS TO DENY THE PETITION

The Court of Appeals decision is correct and, based on this Court's rules, should not be reviewed by this Court on a writ of certiorari.[8] First, this decision does not conflict with any

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[7] Petitioners critique the Court of Appeals en banc decision saying the justices "could not issue a decision on the merits" and treat the rehearing as lacking "meaningful review." (Pet. at 15-16.) Petitioners curiously and without explanation cite the dissenting opinion in *Ratchford v. Gay Lib*, 434 U.S. 1080, 98 S. Ct. 1276 (1978), apparently for the mistaken proposition that the courts of appeals are prohibited from issuing anything less than a detailed memorandum opinion detailing the reasoning behind their decisions. In fact, the cited excerpt from that opinion simply regards the U.S. Supreme Court's right to deny certiorari, i.e., the right to choose to not even hear a case, without explaining its reasons for doing so. The Tenth Circuit did in fact hear the case—it even afforded Petitioners the luxury of hearing their case twice. Under Tenth Circuit Rule 36.1, the Tenth Circuit is not required to issue a detailed opinion in every case.

[8] Supreme Court Rule 10 provides guidance as to what this Court shall consider in evaluating petitions for a writ of certiorari. This Rule provides:

> Review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for

decision of this Court or any other United States court of appeals. In fact, Petitioners make no mention of any other court having ever even addressed this issue. Second, the rule of law that governs this case, found in *Chevron* and its progeny, is settled and was applied correctly in all prior reviews of this matter. The errors Petitioners assert solely regard factual findings. Third, Petitioners' complaints do not raise a question of federal law that must be settled by this Court. Finally, Congress, and not the United States Supreme Court, is best suited to address Petitioners concerns and the redress they seek. There is simply no justification that warrants further review.

1. The decision of the United States Court of Appeals for the Tenth Circuit is not in conflict with any decision by any other court. There is simply no conflict between this decision

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compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals . . . decision . . . conflicts with the decision of another United States court of appeals . . . [or] a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power;

(b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or a United States court of appeals; [and,]

(c) a . . . court . . . has decided an important question of federal law that has not been, but should be settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.

Sup. Ct. R. 10. Reviewing the Petition in light of Supreme Court Rule 10, the Petition should be denied.

and the decision of any other court. Petitioners attempt to create the appearance of a 'conflict' by pointing out that the Tenth Circuit decisions (the decisions from both the three judge panel and the rehearing en banc) were not unanimous. Specifically, Petitioners cite the fact that one of the judges from the original three judge panel issued a dissenting opinion and that the court was split in its decision en banc. (*See* Pet. at 15-16.) By definition, a dissenting opinion will necessarily conflict to some extent with the majority opinion from which it 'dissents.' Petitioners' reasoning seems to ask this Court to widen the scope of cases it deems certworthy to any case in which the judges of a Court of Appeals do not issue a unanimous majority opinion.[9]

This is not at all what is intended by Supreme Court Rule 10(a) which provides that situations where "a US court of appeals has entered a decision in conflict with the decision of another US court of appeals on the same important matter . . ." as an example of when it might be appropriate for the Court to grant a petition for writ of certiorari. Sup. Ct. R. 10(a). Accordingly, there are no grounds based on the idea of a

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[9] Petitioners write, "One consideration in determining whether a petition for certiorari should be accepted is a divided appellate court," and cite three cases for this statement. (Pet. at 15.) In fact, none of the cases Petitioners cited include such holdings, not even in dicta. At best, these cases demonstrate that this Court has heard cases that happen to have arisen from lower court decisions that included divided panels and split en banc rulings. None of these cases, however, suggest that such division, in any way, effected this Court's decision to grant certiorari. The three cited cases were opinions on the merits and barely discuss the Court's reasoning for granting certiorari. One of the cited opinions, *Communications Workers of America v. Beck*, 487 U.S. 735, 108 S. Ct. 2641 (1988), does mention the reasons for granting certiorari to be the need to "resolve important question concerning the validity of such agreements" [regarding certain labor bargaining agreements] and mentions that the Fourth Circuit Court of Appeals' decision at issue in the case "directly conflicts with that of the United States Court of Appeals for the Second Circuit." *Id.* at 741.

'conflict' within the courts for this Court to grant the petition.[10]

2. The Court should not grant the Petition for Writ of Certiorari because the rule of law at issue in this case is settled, undisputed, and was applied correctly; Petitioners' complaints merely focus on factual determinations made in lower decisions. In essence, all Petitioners ask this Court to review is the reasoning of lower decisions that found that the language of the Subpart K Appendix is not inconsistent with the statutory language. This is a factual determination—no rule of law is at issue. Looking at either the ALJ's opinion, the Secretary's decision, the vacated Tenth Circuit panel opinion, or the Tenth Circuit en banc opinion, there is simply no legal question at issue. The factual nature of the issue is evidenced throughout the Petition, including Petitioners' need to re-hash the merits of the case in full therein.[11]

Looking to the merits, the Tenth Circuit Court of Appeal's was correct in its decision to affirm the Secretary's well reasoned opinion that New Mexico satisfies the disparity requirements of 20 U.S.C. § 7709(b) based on the factual finding that the Department's implementing regulation (insofar as it includes the methodology of the Subpart K Appen-

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[10] As such, any discussion of 'conflict' does not aid Petitioners' argument. In fact, if the idea of 'conflict within the 10th Circuit' aids any of the parties, it aids the responding parties at least in so far as it evidences the ambiguous nature of the statute, which will be discussed in greater detail below.

[11] While "Petitioners understand that a detailed analysis of the merits of a case is not always the appropriate vehicle for convincing this Court to accept a Petition for Writ of Certiorari," Petitioners nonetheless continue on to argue the merits. (Pet. at 8-9.) As Supreme Court Rule 15.2 obligates counsel "to point out in the brief in opposition, and not later, any perceived misstatement made in the Petition," we now turn to address the merits of the case as well. Other misstatements in the Petition are listed in Appendix B.

dix) is reasonable, permissible, and does not conflict with the statute. Applying well settled principles of administrative law, as discussed below, the Secretary clearly had the authority to promulgate the regulations at issue, including the Subpart K Appendix. Then, because the Secretary properly applied the statutory disparity test as detailed in the regulations, a fact which is not in dispute, the Secretary was correct in certifying New Mexico as an equalized state.

a. Where the decision of a federal agency is at issue and involves the agency's interpretation of federal statutes, as in the case at bar, the Court's review is guided by the principles established in Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 842-43 (1984), and its progeny. Applying the *Chevron* test requires a two-step analysis. The threshold issue requires the Court to ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842. If the legislative intent on that precise question is clearly and unequivocally spelled out in the statutory language, the reviewing court must give effect to that intent and "that is the end of the matter." *Id.* at 842-43; *see also Udall v. Tallman*, 380 U.S. 1, 16 (1965). However, when the legislation is silent or ambiguous, the courts are generally required to defer to the agency's interpretation if it is based on a permissible construction of the statute. *Chevron*, 467 U.S. at 843. Thus, the second step requires the court to ask whether the agency's interpretation is permissible and reasonable. *Id.*

i. Applying step one, 20 U.S.C. § 7709 is clearly open to multiple interpretations and therefore qualifies as "ambiguous." More specifically, 20 U.S.C. § 7709 is silent as to the precise question of what exact methodology is required to calculate the disparity test. The statute allows states to exclude LEAs above the 95th percentile or below the 5th percentile when determining disparity, but fails to provide a precise formula for calculating disparity between LEAs in a state. While it may be clear that some number of LEAs must

be disregarded before performing the disparity test, the statutory language is unclear as to how to calculate exactly which LEAs are disregarded because what is meant by "per pupil expenditures or revenues above the 95th or 5th percentile of those expenditures or revenues in the State" is open to multiple interpretations. As the Secretary noted,

> [A]lthough the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulations, which has been duly promulgated at an appendix to Subpart K of 34 C.F.R. Part 222.

(Pet. App. at 37a.) Because the statute merely provides parameters for determining disparity, the methodology is unclear and susceptible to differing interpretations. This is precisely the source of the ambiguity.

The statute's ambiguity is also evident from both the arguments and the decisions in the prior proceedings below. Even by Petitioners' own admission, there are multiple possible interpretations of the statutory text. *See e.g.*, Zuni Petition for Review of ALJ Decision at 4 (App. at 4a). From the outset, Petitioners proffered two different approaches for making the disparity calculation. Before the Panel, Petitioners continued to argue this position contending § 7709 would permit the Secretary to follow two different approaches, neither methodology which the statute specifically identifies. Then, in the (vacated) dissent, which Petitioners stress and rely upon so heavily in the Petition, Judge O'Brien actually developed a third specific methodology that differed from the Secretary's methodology as well as the two alternative methodologies proffered by Petitioners. *See Zuni Dissent*, 393 F.3d at 1170-1172. (Pet. App. at 24a) Petitioners do not argue that one of their methods is the correct method; rather, they simply argue that either of its methods is better than the Secretary's

method. In contrast, Judge O'Brien argued in dissent that his new methodology was the only possible correct interpretation. *See Id.* Once presented with this new methodology, Petitioners decided that this new interpretation of the ambiguous statute was the correct one, notwithstanding the two possibilities they initially identified. *See e.g.*, App. at 4a. As the Secretary explained, the fact that Petitioners disagree with the regulation does not render the Department's interpretation of the statute invalid or unreasonable, the regulatory appendix is binding unless procedurally defective. (*See* Pet. App. at 39a.)

In addition to at least four different interpretations being identified over the course of this case, the differing opinions of the Court of Appeals judges as to the meaning of the statute further supports its ambiguous nature. For example, although we recognize that the Tenth Circuit panel decision is void, the disagreement among the panel, is certainly illustrative of the fact that this statute is unclear. Although the dissenting judge considered the statute to be unambiguous, the other two judges on the panel agreed with the Secretary and found the statute to indeed be ambiguous:

> We agree with the Secretary's determination that the statute is ambiguous . . . we do not know what calculations Congress intended by 'such [per pupil] expenditures in the State.' Even Zuni conceded in its argument before the ALJ that the statute 'may be ambiguous [as] to the precise formula that is to be used.' *Id.*, doc. 16 at 10. The statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test, requires us, in accordance with the well-established rule laid out in *Chevron*, to give deference to the Secretary's interpretation of the statute if we deem that interpretation to be reasonable or [permissible].

Zuni, 393 F.3d at 1166-1167. (Pet. App. at 16a-17a.) The difference in opinion between the judges on the panel is

prima facie evidence of the lack of clarity and the Secretary's corresponding authority to promulgate regulations in this area. The judges rehearing the case en banc were similarly split in their opinion further evidencing the statute's lack of clarity.[12]

Petitioners erroneously argue that the Secretary "glided over step one" and failed to identify the source of authority for the Department to promulgate the regulations at issue.[13] In *Chevron*, this Court reasoned that "ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps, the Court explained, involves difficult policy choices that agencies are better

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[12] Petitioners take extreme liberty in casting the Tenth Circuit Court of Appeals as failing to provide "a substantive and definitive review of the Secretary's Action." (Pet. at 15.) Petitioners go so far as suggesting that "six of the judges did not want to disturb the status quo but could not author a credible decision which supported the Secretary's actions." (Pet. at 16.) This suggestion is a fanciful reading of the minds of the six judges. Not only did the Court of Appeals grant rehearing en banc to consider the case beyond Petitioners' review by the three judge panel, an opportunity rarely offered and that Petitioners are not automatically entitled to as right, but also the Court of Appeals dedicated even further time and thought to the matter by granting an actual hearing after reviewing the briefs. Again, this is not something Petitioners were entitled to by right. A more reasonable and likely assessment of the Tenth Circuit's standing opinion is that the court was simply divided, differing in opinion for legitimate reasons similar to the reason the three judge panel was split in their decision—the statute lacks clarity and can be interpreted in multiple ways. The statute's ambiguity, and not indifference from the Court of Appeals to seriously consider the case, is what likely lead to the difference in opinion and resulting split decision.

[13] Actually, Petitioners argumentatively, and rather oratorically, claim the Secretary failed to "identify the source of his authority to countermand a federal statute." Clearly and not in dispute, there is no authority to "countermand" a federal statute. As discussed herein, the regulations at issue clarify, and do not countermand, the corresponding statute.

equipped to make than courts." *Nat'l Cable & Telecomm. Assn. v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005) (relying on *Chevron*, 467 U.S. at 865-66). *See also Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996). "[T]he whole point of *Chevron* is to leave the discretion provided by the ambiguities of a statute with the implementing agency." *Nat'l Cable & Telecomm. Assn.*, 125 S. Ct. at 2699 (quoting *Smiley*, 517 U.S. at 742 (1996)).

In the instant case, while there is no express delegation of authority to the Department to define the methodology for determining disparity under 20 U.S.C. § 7709(b), there is an explicit delegation to the Department to evaluate a State's equalization of public school funding using the disparity standard. *See* 20 U.S.C. §§ 7709(b)(2)(B), 7709(b)(3) and 7709(c). The governing statute, as described above, lacks a precise methodology that the Department or states should utilize to make the required disparity determination (i.e., how to specifically determine the 95th and 5th percentiles of per-pupil expenditures in the State). However, it is obvious that some methodology is necessary. This constitutes an implicit delegation to the Department to set out the precise methodology to be employed, which, if reasonable, must be sustained under the *Chevron* doctrine.

The statute's failure to provide an exact formula for computing disparity, the various possible methodologies identified for computing disparity, the consistent findings throughout the proceedings, and the Court of Appeal's varying opinions, all illustrate the lack of clarity in the statute. These facts, including that at least four different interpretations of the same statute have been placed before the Court through the record, proves that the statute qualifies as "ambiguous" under the first prong of the *Chevron* doctrine. Thus, because the statute is ambiguous, the Department was authorized to fill the statutory gap with interpreting regu-

lations—so long as such regulations pass the second prong of the *Chevron* analysis, permissible and reasonable.

ii. Because the statute is ambiguous and the Department of Education is thus authorized to promulgate regulations regarding this matter, this Court now considers the second part of the Chevron test, whether the Secretary's regulatory scheme is a reasonable and permissive interpretation of the statutory language and congressional intent. See Chevron, 467 U.S. at 843. The degree of deference to administrative agencies on this prong of the test is significant. In cases where the relevant statute is "silent or ambiguous", courts are generally required to defer to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843. The agency's construction need only be "rational and consistent with the statute." *See NLRB v. United Food and Commercial Workers*, 484 U.S. 112, 123 (1987). An agency's interpretation of a statute must be "given controlling weight unless it is arbitrary, capricious or manifestly contrary to the statute." *Sac and Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1261 (10th Cir. 2001) (citing *Chevron*, 467 U.S. at 843-44), *cert. denied*, 534 U.S. 1078 (2002). *See also Swonger v. Surface Trans. Bd.*, 265 F.3d 1135, 1140 (10th Cir. 2001), *cert. denied*, 535 U.S. 1053 (2002); *Maier, P.E. v. United States Envtl. Prot. Agency*, 114 F.3d 1032, 1040 (10th Cir. 1997), *cert. denied*, 522 U.S. 1014 (1997). Because the regulations at issue, including the Subpart K Appendix, are reasonable and permissible interpretations of the statute by their plain meaning, because congressional intent further supports this interpretation, and because Congress has chosen to not alter the regulatory scheme, the regulations pass the *Chevron* test and must be upheld.

(a.) By its plain meaning, the regulatory scheme for determining disparity that Petitioners here challenge is a reasonable and permissive interpretation of the statutory language and Congressional intent. The statute requires that the Secre-

tary, in making the disparity determination, "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B). The Secretary's interpretation clearly does just this. The statutory phrase "with per-pupil expenditures or revenues above . . . or below" describes which LEAs must be disregarded in completing the disparity determination. Therefore, in order to determine which LEAs will be disregarded, a mandatory prerequisite step requires determining what is the State's per-pupil expenditures or revenues at the 95 and 5th percentiles.

As the Secretary's interpretation spelled out in the regulation's details, the 95th and 5th percentiles are determined based on the total student enrollment.[14] *See* 34 C.F.R. pt. 222, subpt. K, app. First, per district (or LEA) averages for per-pupil expenditure or revenues are established and the LEAs are ranked in this order from highest to lowest.[15] Next, the Secretary considers total student population and determines in which LEA the 95th and 5th percentiles of total students, as they are ranked in order by their LEA's average revenue per-pupil, fall.[16] LEAs ranked respectively above

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[14] Any interpretation that ignores the number of students in each district could create great flaws and inconsistencies in comparing true per student expenditures or revenues across the entire State.

[15] New Mexico employs per-pupil revenues and abbreviates these LEA figures as "revenue per MEM."

[16] Because every individual student has a corresponding per-pupil revenue determined by the LEA in which that student attends school, selecting the 95th and 5th percentiles of total membership in the manner prescribed by the regulations is the equivalent of selecting the 95th and 5th percentiles of total per-pupil revenues directly corresponding to each student in the state. In other words, in selecting the 95th and 5th percentiles of total students, the State selects the 95th and 5th percentile of the total number of per-pupil revenues corresponding to each student in the State.

and below the identified LEAs, that, according to the precise statutory language, are "with per-pupil expenditures or revenues above the 95th or below the 5th percentile of such revenues in the State," are disregarded before making the disparity determination. I.e., Once the 95th and 5th percentiles of per pupil expenditures or revenues are identified, the Secretary must proceed to exclude, or disregard, the LEAs above and below the respective cutoff points. The LEAs containing the actual cutoff points are not excluded which is a type of rounding that favors the Petitioners and makes it more difficult to meet equalization.

Clearly, by their plain meaning, the regulations, in accordance with the statute, require the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B); 34 C.F.R. § 222.162(a). The Secretary's interpretation excludes such LEAs and is undoubtedly "rational and consistent with the statute" (*United Food and Commercial Workers*, 484 U.S. at 123) and "based on a permissible construction of the statute" (*Chevron*, 467 U.S. at 843). The regulations being far from arbitrary or capricious, the Court must defer to the agency's interpretation.

(b.) Moreover, looking beyond plain meaning to legislative history and policy behind the statute further supports the reasonableness of the Secretary's regulatory scheme. When reviewing an ambiguous statute, the Court should "look to the provisions of the whole law, and to its object and policy," rather than the specifically disputed provisions in isolation. *Aulston v. United States*, 915 F.2d 584, 589 (10th Cir. 1990), *cert. denied* 500 U.S. 916 (1991). When Congress promulgated the current statute, it decided that disparity should be the sole standard for determining equalization under 20 U.S.C. § 7709(b), but failed to prescribe a precise methodology for calculating disparity. By leaving a gap in the statute,

Congress delegated authority to the Department to fill the statutory gap. *See National Cable & Telecommunications Assoc.*, 125 S. Ct. at 2699 (analyzing *Chevron*, 467 U.S. at 865-866). The Department responded to Congress' directive by promulgating 34 C.F.R. § 222.162, which includes 34 C.F.R. pt. 222, subpt. K, app.

The statutory provision at issue in this case was originally enacted as part of the Education Amendments of 1974, Pub. L. No. 93-380, 88 Stat. 484 (1974). As expressed by the legislative history, states have the responsibility of providing an equal minimum educational opportunity for all public school students while also spreading the tax burden for such opportunities equitably. *See* House of Representatives Comm. on Education and Labor, Public Law 874 and State Equalization Plans: The Problems of the Legislative Prohibition of Section 5(d)(2) (Comm. Print 1974). In other words, an equalized system of state funding for public education should be equitable for both the children who attend public schools and the taxpayers who pay the costs of public education. *See* A.R. Odden & L.O. Picus, *School Finance: A Policy Perspective* (2d ed., McGraw Hill 2000). The measurement of disparity across 90 percent of the State's student population—as reflected by the Subpart K Appendix—is therefore consistent with Congress' intended framework for assessing a state's school finance structure.

The regulation reflects congressional intent. This point is illustrated by a response the Commissioner of Education made to comments on the proposed regulations in 1974. Specifically, the Commissioner was asked whether pupils or school districts are to be considered when determining the 95th and 5th percentile exclusions. After considering the methodology to be used, the Commissioner responded that the percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts. The Commissioner reasoned:

> . . . basing *an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures.* In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

See 41 Fed. Reg. 26,323-24 (Jun. 25, 1976) (emphasis added). The Department's current regulation, and the appendix to Subpart K expressly adopted therein, maintains the disparity standard and methodology described above. *See* 34 C.F.R. § 222.162; 34 C.F.R. pt. 222, subpt. K, app. Basing the disparity calculation on the number of pupils, as set forth in the regulation, complies with congressional intent. Because the methodology is based on the expressed intentions of Congress and the agency's unique understanding of school finance issues, the Department's regulation is a reasonable and permissive implementation of the statutory requirements.

(c.) Furthermore, the underlying legislative intent of the Impact Aid regulations did not change when Congress amended the statute in 1994.[17] While Congress was aware of

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[17] Petitioners make the conclusory allegation that "The 1994 legislation makes clear that the Secretary was divested of his authority to continue using the old equalization formula in diverting Impact Aid funds from impacted districts to the State" confusingly citing *Gonzales v. Oregon*, __ U.S. __, 126 S. Ct. 904 (2006). (Pet. at 13.) *Gonzales* regards an interpretive rule by the U.S. Attorney General regarding assisted suicide and makes no reference whatsoever to the 1994 amendments, the Secretary of Education, or to the Impact Aid laws in any way. Similarly, Petitioners' accusation that the Secretary "ignore[s]" congressional statutes is baseless.

how the Department had historically applied the disparity standard—reflected at 34 C.F.R. § 222.63 (App.) (1993)—it did not adopt or preclude that precise methodology in the 1994 statutory amendments.[18] Congress presumably determined that while disparity should be the sole standard for determining equalization under 20 U.S.C. § 7709(b), the precise methodology for applying the disparity standard was an issue that should remain within the Department's discretion. As a result of this implicit acknowledgment by Congress of the Department's administrative expertise on the question of calculating disparity, the Secretary's decision below must be affirmed if the underlying regulatory scheme is a reasonable and permissive interpretation of the statutory language and Congressional intent.

Understanding that the intent did not change, the Department mirrored the pre-1994 regulations, which included a specific methodology for applying that standard, in the current appendix to subpart K. *See* 34 C.F.R. § 222.63 (App.) (1993). By changing language from pupil to LEA, the new statute simply clarified what the Department was already doing. The Secretary's disparity test removes LEAs, but in determining which LEAs to remove, the Department considers all students state-wide. The Department's current regulation contains the same per-pupil expenditure percentile ranking method as outlined in earlier appendices, and details the same methodology for calculating the twenty-five percent disparity test. The agency has not altered the methodology

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[18] From 1974 until 1994, the Impact Aid law provided the Department with near-total discretion to establish multiple standards by which States could obtain certification of equalization. One of three standards promulgated by the Department was the 25 percent disparity test, then set forth at 34 C.F.R. § 222.63 (1993). In 1994, Congress adopted the disparity test as the sole statutory standard for determining whether a State equalized its expenditures for all LEAs. The pre-1994 regulations also included a specific methodology for applying that standard, which is mirrored by the current Subpart K Appendix. *See* 34 C.F.R. § 222.63 (App.) (1993).

for calculating disparity since 1976 because Congress has never changed its intent to administer a fair disparity standard. Duplicating the pre-1994 computation in the appendix to subpart K conforms to congressional intent.

Because the regulation, by its plain meaning, simply clarifies and does not conflict with the statute, and because the regulation is based on and supported by congressional intent, legislative history, and the agency's comprehensive understanding of school finance issues, the Department's regulation is a reasonable and permissive implementation of the statutory requirements. The Secretary acted reasonably in promulgating this regulatory scheme to clarify the ambiguous statute. Therefore, the Secretary's decision is reasonable and permissible, and should be upheld.[19]

3. Petitioners' arguments regarding the importance of the Impact Aid program do not justify a reason this Court should grant their Petition. While the Impact Aid program certainly serves a valuable purpose and is of great importance to those school districts affected by it, the program is significantly limited in scope and size. Considering how little of the nation is directly impacted by the statute and corresponding regulations at issue in this case highlights the limited nature of the program. Since Fiscal Year 1994, only three states (Alaska, Kansas, and New Mexico) have come before and been certified by the Secretary as operating equalized school aid programs. Insofar as Petitioners' arguments may be considered relevant to the example presented in Supreme Court

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[19] New Mexico properly applied the methodology established in the regulation for determining equalization, and Petitioners do not dispute this fact. Then, since the regulation is a reasonable and permissible construction of 20 U.S.C. § 7709(b), the New Mexico's disparity determination and the Department's certification thereof is proper. Petitioners' claim that the formula does not comply with 20 U.S.C. § 7709(b) is without merit, and the Secretary's decision should be affirmed.

Rule 10(c), the case at issue does not regard an important question of federal law that must be settled by this Court.

4. Finally, review by this Court is not the appropriate recourse for Petitioners to address their concerns; Congress has the ability to address such concerns and the means by which Petitioners should seek recourse. Congress is best suited to settle and address Petitioners' concern. Congress has the power and has had the opportunity to address this matter but has decided to permit the Secretary's interpretation to remain the governing law.

Congress has expressed no concern about the Department's regulatory implementation of 20 U.S.C. § 7709(b) despite multiple and recent opportunities to do so. In spite of recent legislative activity concerning the Impact Aid law generally, including statutory amendments, Congress has not indicated in any manner that the Department's regulatory implementation of 20 U.S.C. § 7709(b) is inappropriate or otherwise flawed. In October 2000, Congress reauthorized the overall Impact Aid statute without altering or commenting on the disparity standard whatsoever. *See* Impact Aid Reauthorization Act of 2000, Pub. L. No. 106-398, 114 Stat. 1654A-368 (2000). Most recently, the 107th Congress amended the Impact Aid law as part of the No Child Left Behind Act, Pub. L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). Once again, there were no changes to the statutory provisions at issue in this case.

When Congress "re-enacts a statute without change," it is "is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation." *See, e.g., Lorillard v. Pons*, 434 U.S. 575, 580-581 (1978) (citing numerous cases). Considering the recent legislative history discussed above, Congress appears perfectly satisfied with the Secretary's interpretation of 20 U.S.C. § 7709(b). For the Court, then, to act would exceed its role and power in our nation's system of checks and balances.

Accordingly, Petitioners' complaint is not properly with this Court. They disagree with a longstanding duly promulgated regulatory interpretation of a Congressional statute. They are adamant that their interpretation of this statute is a better one than that of the regulatory agency assigned the responsibility of the administration of this law. Their remedy is with the Congress, not this honorable Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully Submitted,

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July 31, 2006

APPENDIX

APPENDIX A

UNITED STATES OF AMERICA
DEPARTMENT OF EDUCATION

Docket No. 99-81-I
Impact Aid Case

IN THE MATTER OF ZUNI PUBLIC SCHOOL DISTRICT #89 AND GALLUP-MCKINLEY PUBLIC SCHOOLS,
Applicants,

PETITION FOR REVIEW OF ADMINISTRATIVE LAW JUDGE DECISION BY THE SECRETARY OF THE UNITED STATES DEPARTMENT OF EDUCATION

COMES NOW the Zuni Public School District (hereinafter "Zuni"), by and through undersigned counsel, and hereby requests the Secretary of the United States Department of Education to review the opinion of the Honorable Allen C. Lewis, Chief Administrative Law Judge entered on April 17, 2001 and received by Zuni on April 24, 2001. The Administrative Law Judge determined that he did not have jurisdiction to address the substance of Zuni's claim that an appendix to the Department of Education regulation was invalid as it conflicted with statutory language involving the same matter. Accordingly, this request for review does not seek to overturn the decision of the Administrative Law Judge, but seeks a decision on the merits of Zuni's claim, which is clearly within the jurisdiction of the Secretary.

I. Impact Aid Issue

This appeal related to Federal Impact Aid which is paid by the federal government to school districts (local educational agencies "LEA's") which are impacted by a federal presence.

Zuni School District, for instance, has as its boundaries the boundaries of the Zuni Pueblo Reservation. Because of this reservation status, real property within the school district cannot be taxed. Because it cannot be taxed, Zuni cannot raise revenues through real property taxes. Impact Aid is supposed to compensate Zuni for this disability.

There is a statutory prohibition against a State taking credit for Federal Impact Aid payments made to LEAs in determining the amount of the state's contribution to LEAs for free public education. 20 USC § 7709A (1994). An exception to this general prohibition is also created by federal statute and permits a state to take credit for Federal Impact Aid if a state "has in effect a program of state aid that equalizes expenditures for free public education among local educational agencies in such state." 20 USC § 7709(b)(1).

In 1994, Congress created the disparity test to be used to determine whether a state equalized expenditures among its LEAs. 20 USC § 7709(b)(2)(A) provides:

> If, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency and the state with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the state with the lowest such expenditures or revenues by more than 25%.

In recognition that an anomaly may develop when comparing the bottom ranked LEA with the top ranked LEA, Congress adjusted the field to create a more homogenized group of LEAs from which to compute the disparity. 10 USC § 7709(b)(2)(B)(i) and 34 CFR § 222.162(a) (1999) provides that in working this calculation, the Secretary shall "disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile

of such expenditures or revenues in the State." The disparity percentage is then calculated by determining the difference between the revenue per-pupil of the LEA at the 95th percentile and revenue per-pupil of the LEA at the 5th percentile. The difference is then divided by current expenditure or revenue per-pupil of the LEA at the 5th percentile and yields the disparity percentage.

The Appendix to sub-part K of 34 CFR Part 222, however, mandates that the student population of the State, not the LEA population, be used and adjusted to determine the per-pupil expenditure or revenue at the 5th and 95th percentiles:

> The determinations of disparity are made by ranking all LEAs and then identifying those LEAs in each ranking that falls at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs . . .

An example is then provided, which ranks the LEAs in order of expenditures per student, eliminates 5% of the student population beginning at the top and draws a line at that point to determine which LEA is now considered to be the top ranked LEA. The same process is followed in eliminating the bottom ranked LEAs. The State of New Mexico, instead of following the language in the statute or the language in the the body of the regulation, which essentially parrots the statute, followed the example in the Appendix. When New Mexico drew the line after eliminating 5% of the students from the top and from the bottom, it found itself drawing a line in the middle of LEA units. In trying to convert the elimination of students to the elimination of LEA's, New Mexico moved the line to the next LEA and eliminated 5.1% of the students from the top and 6.9% of the students from the bottom. While this demonstrates the difficulty in straying from the statutory language, the true issue is whether the Appendix to the regulations conflicts with the statutory language.

The critical language in the statute is that the Secretary is to:

> "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in this state".

Breaking this down, one is to "disregard local educational agencies", not students. Thus, the focus of the elimination is on LEAs. The statute continues and provides that LEA's are eliminated from the calculation if they have "per-pupil expenditure or revenues above the 95th percentile or under the 5th percentile." Thus, one is to look at the LEAs themselves and their relative per-pupil expenditures or revenues. Eliminating LEAs by eliminating students has nothing to do with this requirement. The statute then continues and sets forth the standard against which these per-pupil expenditures are measured, which is "of such [per-pupil] expenditures of the state." Again, there is no suggestion that member count or student count works its way into this elimination process.

There are only two possible interpretations of this language, neither of which include the methodology described in the Appendix or used by the State of New Mexico. The first option is the most obvious. The top 5% of the ranked LEAs and the bottom 5% of the ranked LEAs are eliminated. This would eliminate the top four or five districts and the bottom four- or five districts. New Mexico, following this procedure, would have a disparity of 26.93%, which means that the State is not equalized and is not entitled to keep the Impact Aid Funds paid to Zuni and similar districts.

The only other supportable method would to multiply the per-pupil figures for the highest LEA by 95% and per-pupil figures for the lowest LEA by 105%, draw the line and eliminate all LEAs above the top line and eliminate all LEAs below the bottom line. Performing this calculation would produce a disparity in New Mexico of 117.4%.

Both of these methods follow the mandates of the statute. They eliminate LEAs with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such revenues or expenditures of the State.

The purpose of Impact Aid should not be lost in this process. Congress has provided that when school districts are impacted by a federal presence, the federal government will pay its own way. An *exception* exists which allows a state to take credit for Impact Aid payments only if state funding is equalized among districts. To make this exception easier to obtain, differences in payments to school districts which reflect idiosyncratic needs are subtracted from the per-pupil expenditure calculations. Then the statute provides for eliminating the top 5% of the LEAs and the bottom 5% of the LEAs to further even out the field. Finally, the statute allows for up to a 25% disparity between the top and bottom LEA in this adjusted field. Nevertheless, only three states, New Mexico, Alaska and Kansas, even attempt to take credit for Impact Aid. For some reason, the United States Department of Education enacted a regulation which, in the case of New Mexico, enabled New Mexico to take credit for Impact Aid when, under the federal statute, it did not qualify for such privilege. By following the Appendix, New Mexico has eliminated 28% of all of its LEAs before it begins making its disparity calculation. Such an extraordinary adjustment would probably qualify any state to take advantage of the exception and take full credit for Impact Aid. This, in turn, destroys the whole purpose of Impact Aid and turns Impact Aid into a mechanism for funding State education as a whole. This is not an ignoble effort, but has nothing to do with Impact Aid.

Arguments were made by the Departments of Education (both Federal and State) that the statutory language upon which Zuni relies was constructed without due cause or reflection. The Appendix, it was argued, was the product of greater knowledge and understanding. Following the statutory

language, the Department warned, might result in none of the three remaining states qualifying for Impact Aid credit. These contentions, however, display a patronizing approach which is not only unwarranted, but illegal. See *Chevron USA, Inc. v. Natural Resources Defense*, 467 US 837, 843 (1984) and *Whitman v. American Trucking Association., Inc.. et al*, 121 S.Ct. 903, 918-19 (2001). An agency cannot override a Congressional enactment which "has directly spoken to the precise question at issue". *Chevron USA. Inc. v. Natural Resources Defense, supra.* Further, the result of not qualifying for the exception is that the LEA which is federally impacted receives its fair compensation. That was the intended purpose of Impact Aid.

The question before the Administrative Law Judge and the question posed by the Administrative Law Judge was how an Appendix to a regulation which conflicts with direct Congressional statutory language can survive. Attached are excerpts of the transcript of hearing with the Administrative Law Judge. The only conclusions that can be drawn from the exchanges between the Administrative Law Judge and counsel are that (a) the only reason that the Administrative Law Judge did not invalidate the Appendix to the regulation and decertify New Mexico as an equalized state was that the Judge determined that invalidating the Appendix to the regulation would be the same as invalidating a regulation, and this was beyond his jurisdiction; and (b) counsel for the United States Department of Education and the New Mexico Department of Education essentially agreed that the Appendix language does not find support in federal statute, but that the Secretary was exercising an apparent discretion to amend statutory language so as to achieve desired results. A synopsis of the exchange between Judge Lewis and counsel for the United States Department of Education, Mark Smith, follows:

On page 29, Judge Lewis notes that the United States Department of Education took the position that "Congress

made a mistake, that there were certain words in the statute that they left out or the drafting changed the language" such that there was a "substantial difference between what . . . Congress intended . . ." and what "Congress in fact put in there". Mr. Smith responded that he did not think Congress was "100% accurate with their language". On page 30, Judge Lewis asked Mr. Smith to show the Judge how "using the language in the statute, you can come to the results under the regulation?" Mr. Smith replies that one simply uses "the language of the regulation". To which Judge Lewis responded "in other words, the statute does not support the regulation? Its different?" Mr. Smith admits "it is different". Judge Lewis then comments that because of the difference,"it calls for the result that Zuni asks for?" Mr. Smith again jumps back to his position that Congress was unable to properly articulate its intent.

On page 32 Judge Lewis is still concerned about the difference between the statute and the regulation and asks Mr. Smith if perhaps he could point to some ambiguity which would provide the flexibility to perhaps validate the regulation. Judge Lewis states "and I've got a real problem if I have to decide this thing if I have to choose between what's in the statute and what's in the regulation. If you can show me the statute's ambiguous, then under normal rules of construction, you can then move over to the regulations which then interpret an ambiguous statute". Mr. Smith's response on page 33 is "the only way I can do that is by reference to the statutory purpose". Not satisfied with this answer Judge Lewis states at page 33, "but the only thing that we have from Congress is what Congress said in the statute . . . and if we go with Justice Scalia, he would say, that's it." Mr. Smith responded with the categorical statement that the statutory provision had to be construed in light of the history.

Mr. Jonathan Tarnow from the firm of Brustein and Manasevit of Washington, D.C., who represented the New

Mexico State Department of Education, had equal difficulty in trying to reconcile the statute with the regulation. At page 59 Judge Lewis states ". . . as I read your brief on the main issue, you seem to think that the statute is consistent with the use of the student population, and I want you to show me how you can get there under the terms of the statute." Mr. Tarnow' s response was "well, actually, Your Honor, since submitting—I think we've done a lot of thinking about this issue and this conflict that seems to appear, and I'm not certain that we would state that so plainly at this time. It is arguable that there is a difference, and we would defer to Mr. Smith on the Department's interpretation." When Mr. Tarnow then states that the statute "doesn't specifically state you look at the LEAs", Judge Lewis at page 60 responds "I want you to tell me what your interpretation is and show me how you get there under the statute". At page 60 through 65, Mr. Tarnow then describes a new method for calculating the disparity which finds support in neither the statute nor the regulation. Judge Lewis points out at page 65 that this interpretation "is then inconsistent with the regulation". Mr. Tarnow replies "arguably". When pushed, Mr. Tarnow then jumps to the original position which he had earlier discounted and states at page 65 "well, it's . . . again, Your Honor, we would agree with the Department that the only reasonable way of determining disparity is on a per-pupil expenditure is considering the students and not the LEAs". Judge Lewis finishes his discussion on this issue with Mr. Tarnow on page 67 and states that "it sounds as if your view is that the statute in the body of the reg as opposed to the appendix calls for a result different or method different than what's been adopted in the appendix". Mr. Tarnow responded "I would . . . I can see how . . . I could make an argument that is the case". Judge Lewis then stated: "Don't make an argument. Tell me what your position is". Mr. Tarnow stated that his position was "that the State followed the regulation and the regulation includes the Appendix". When asked by Judge Lewis "how is that consis-

tent with the statute, your interpretation of the statute?" Mr. Tarnow replied "literally, on the face of the words, perhaps not, probably not. But again, looking at the overall intent of the Impact Aid Program, the fact that if we were to read this exception from Section 8009 in a way that the districts would have us read it, that perhaps no state would qualify and the purpose of an exception is therefore undercut, and the purpose of enacting it by Congress is then called into question".

The whole problem with the Departments of Education's approach is that they attempt to justify overriding clear statutory language with a regulation appendix based upon their conception of the overall intent of Impact Aid. This purpose, as articulated by the Departments, is to not provide money to impacted school districts, but to provide money to states to assist in financing all school districts, whether or not they are impacted by a federal presence. This makes no sense.

The only conclusion that can be drawn is that the United States Department of Education in defending its regulation, and the State of New Mexico in attempting to keep Impact Aid dollars from deserving districts, seek to elevate a regulation over a statute in pursuit of a purpose which is clearly antithetical to the whole concept of Impact Aid.

The Secretary has jurisdiction over its own regulations. If, in this case, a regulation is clearly contrary to federal statute, there is no point in standing pat and forcing Zuni to continue litigation which Zuni believes will inevitably lead to the invalidation of this regulation. If New Mexico is not equalized under the standards set by Federal Statute, then the original intent and purpose of Impact Aid will be fulfilled. Zuni and other districts will receive their Impact Aid funds to which they are entitled because of a federal presence. The Secretary should declare the Appendix to be invalid and decertify New Mexico as an equalized state.

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APPENDIX B

Supreme Court Rule 15.2 requires:

> . . . In addition to presenting other arguments for denying the petition, the brief in opposition should address any perceived misstatement of fact or law in the petition that bears on what issues properly would be before the Court if certiorari were granted. Counsel are admonished that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition. . . .

Accordingly, and in addition to the arguments and statements made in the foregoing Brief in Opposition, New Mexico points out the following perceived misstatements made in the petition:

1. The Petition, on page 7, incorrectly states that a predetermination hearing was held for the certification at issue. In fact, as the parties stipulated (see Petitioner's Appendix F, pg. 202a, paragraph 21), no predetermination hearing was held that year. Petitioners apparently have their years confused. For all subsequent years, we have had predetermination hearings, but no predetermination hearing was held for the year at issue in this case.

2. In the Petition's Appendix B (pp. 30a-33a), the panel decision, the exhibit to the dissent has been reformatted by the printer in such a way that it may not be clear which districts Judge O'Brien is referring to as the ones at the cut-off points under his method.

3. The sequence of exhibits in Petitioner's Appendix D is peculiar. The notice of certification (pg. 41a) was issued as a part of the determination and really belongs back at page 216a where that same document is also presented. There is no reason to pre-

sent it a second time in Appendix D along with the ALJ's decision.

4. Beginning at page 163a, the Petitioner's Appendix purportedly presents the Department's final Impact Aid rules published on September 29, 1995, (*See* 60 Fed. Reg. 50,774 (Sept. 29, 1995)). This is inaccurate. In fact, it: 1) presents a heading from an entirely different notice, 2) omits virtually the entire preamble to the final Impact Aid rules, 3) omits the other Impact Aid regulations issued that day that are not germane to the case but were in the notice; and, 4) omits 222.161 which is germane to the case. The cited notice includes pages 50,774-50,800. Petitioners, however, only included pages 50,778-50,779 and 50,798-50,800.

5. At page 211a of the Petition (Petitioner's Appendix F), the entries for Santa Fe in the first two columns should be should be $3,050 and 1,344 respectively.

6. Also on page 211a of the Petition (Petitioner's Appendix F), the Total Mem. for Central should be 7,314.

7. On page 239a of the Petition (Petitioner's Appendix J) the figure in the second numerical column for Questa should read 1.182.

8. To clarify for the record, Petitioner's Appendices G, H, I, and J were not part of the administrative record of the decision under review.

(9)

No. 05-1508

Supreme Court, U.S.
FILED
NOV 9 - 2006
OFFICE OF THE CLERK

In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO. 1

Petitioners,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

JOINT APPENDIX

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Petition for Certiorari Filed May 24, 2006
Petition for Certiorari Granted September 26, 2006

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Impact Aid Disparity for 1999-2000 . . . . . JA 89

5 U.S.C. § 553 . . . . . JA 93

RELEVANT DOCKET ENTRIES

U.S. COURT OF APPEALS
FOR THE 10th CIRCUIT

01-9541

11/16/01 [1464347] Petition for review filed. Original 5 copies. c/s: y. Copy of petition served on party at address shown in 11/16/01 letter. Fee pd: chk.#: #34007 rcpt #: #10435 amt:$ $100.00. DATE RECEIVED: 11/16/01. Docketing statement due 12/3/01 for Gallup-McKinley, for Zuni Public School. Agency record due 12/26/01 for Gallup-McKinley, for Zuni Public School. Notice of appearance due 11/29/01 for EDUC, for Gallup-McKinley, for Zuni Public School. (kjs)

12/30/04 [1768854] Terminated on the Merits after Oral Hearing; Enforced; Written, Signed, Published. Seymour, authoring judge; Henry; O'Brien, dissenting. [01-9541] Parties served by mail on 12/30/04. (oac)

01/13/05 [1772238] Petition for rehearing in banc filed by Zuni Public School and Gallup-McKinley. Original and 19 copies. c/s: y. (lg)

01/13/05 [1772239] Document [1772238-1] Petition for rehearing en banc filed by Petitioners' Zuni Public School and Gallup-McKinley submitted to panel. (lg)

02/23/06 [1891495] Terminated on the Merits after Oral Hearing; Enforced/Affirmed; The panel decision is vacated. Written, Signed, Published. Heard en banc; Seymour; Ebel; Kelly; Henry; Briscoe; Lucero; Murphy; O'Brien; McConnell; Tymkovich. [01-9541] Parties served by mail on 2/23/06 (lg)

LIST OF THE AGENCY RECORD
IN THE MATTER OF ZUNI PUBLIC SCHOOL DISTRICT #89 AND GALLUP-MCKINLEY PUBLIC SCHOOLS

(Docket Number 99-81-I)

1. Letter from Mark W. Smith to Frank J. Furey, Director, Office of Hearings and Appeals (December 17, 1999), requesting appointment of an administrative law judge (ALJ) and enclosing Notice of Certification and Report (October 5, 1999) and hearing requests of Zuni Public Schools (October 25, 1999) and Gallup-McKinley Public Schools (November 8, 1999).

21. Initial Decision with cover letter (April 17, 2001).

22. Zuni Public School District Petition for Review of Administrative Law Judge Decision by the Secretary of the United States Department of Education (May 18, 2001).

23. Gallup-McKinley County Public School District Petition for Review of Administrative Law Judge Decision by the Secretary of the United States Department of Education (May 23, 2001).

25. Decision of the Secretary (October 11, 2001).

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ADMINISTRATIVE LAW JUDGES

Docket No. 99-81-I
Impact Aid Proceeding

In the Matter of	)
Zuni Public School District #89	)
and Gallup-McKinley Public Schools	)
Applicant.	)
	)

DECLARATION OF RICHARD G. SALMON

I, Richard G. Salmon, hereby depose and say as follows:

1. My full name is Richard G. Salmon.

2. Since May 1989, I have been a professor in Educational Administration in the College of Human Resources and Education of the Virginia Polytechnic Institute and State University. My responsibilities include graduate teaching, conducting research and field service in school finance. I have specialized in educational finance equity issues since 1969.

3. My specialization in school finance matters has included numerous assignments as a consultant and appearances as an expert witness in administrative, State and Federal Court proceedings. I have also had published a number of books, book chapters, monographs, journal articles and technical reports. A copy of my Abbreviated Vita is attached to this Declaration.

4. I have been familiar with the disparity standard, also known as the Federal Range Ratio, since its promulgation in 1976. It is essentially the statutory standard now contained in section 8009(b) of the current Impact Aid law.

5. The disparity test in both the former regulations and Section 8009 is a range measure of equity; its focus is the range between the high value in the ranking, set at the 95th percentile of all pupils in the State, and the low value in that ranking set at at the 5th percentile of all pupils in the State. It focuses exclusively on extremes rather than the entire distribution.

6. It is the practice in the field in using tests of this kind to exclude the segments of the student population at the margins of the ranking so as to avoid having their per-pupil input (i.e., expenditure or revenue) falsely overstate disparities. Where the objective is to evaluate whether a funding formula treats similarly situated students similarly, it is appropriate to avoid per-pupil test inputs that erroneously overstate disparities. A reasonable and appropriate corrective measure in a ranking of LEAs by revenues or expenditures per pupil is to exclude the per-pupil inputs of LEAs at the 95th and 5th percentiles of all pupils in the State. When modified in this way, an equity measure of this kind is known as a restricted range measure.

7. The former Appendix to 34 C.F.R. Part 222 restricted the range of the disparity standard in a methodologically sound manner by excluding

LEAs in the ranking that fell above or below the 95th and 5th percentiles of the total number of students in the State. The appendix to the current regulations, Appendix to 34 C.F.R. Part 222, Subpart K, is in accord. A percentile exclusion based on students as the unit of analysis, as specified in these appendices, is a reasonable and effective adjustment under the circumstances.

8. The methods Zuni Public School District # 89 uses with respect to the percentile exclusions are incorrect. Zuni's first calculation simply applies the 5% to the number of LEAs in the State, eighty-nine, to get four or five, and then eliminates five LEAs off the top and bottom of the ranking. Applying the percentiles to the number of LEAs in the State is not applying the percentiles to revenues per pupil nor does it appropriately restrict the range of the disparity test by excluding LEAs from the disparity test.

9. Likewise, Zuni's method of applying percentiles to the revenues per membership of the highest and lowest LEAs in the State and then excluding LEAs with per pupil revenues above or below the product of those calculations is not a proper method of restricting the range of the disparity test.

10. It is characteristics of the students at the margins that may confound disparity test results, not characteristics of revenues or expenditures that may do so. Therefore, it is inappropriate to exclude the top and bottom 5 percentiles of expenditures or revenues per pupil in lieu of

pupils. That method would not prevent the problem of false disparities. To read the statute in the manner suggested by Zuni would be to render the test ineffective to gauge whether a State's program is achieving equity.

11. As measured by the statutory standard in Section 8009, New Mexico has a highly equalized funding formula. Without the ability to consider Impact Aid as an equalized State as provided by law, New Mexico's efforts to equalize expenditures would be seriously hindered by the Impact Aid paid to LEAs in the State.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

/s/_____
Richard G. Salmon

April 25, 2000

STATE OF VIRGINIA
County of Montgomery, to-wit:

Sworn to and subscribed by Richard Salmon before me this 25th day of April, 2000.

Witness my hand and official seal.

/s/_____
Notary Public

My commission expires:
Nov. 30, 2002

U.S. DEPARTMENT OF EDUCATION
OFFICE OF HEARINGS AND APPEALS
HEARING

No. 99-81-1

In the Matter of:	)
	)
ZUNI PUBLIC SCHOOL DISTRICT #89	)
and	)
GALLUP-McKINLEY PUBLIC SCHOOLS	)
	)

Rio Grande Courtroom
Federal Courthouse
333 Lomas Street, NW
Albuquerque, New Mexico

Wednesday, October 4, 2000

The above-entitled matter came on for hearing, pursuant to notice, at 9:30 a.m.

BEFORE: HON. ALLAN C. LEWIS
Chief Administrative Judge

APPEARANCES:

On behalf of the U.S. Department of Education:

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On behalf of the Gallup-McKinley Public Schools:

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PROCEEDINGS

JUDGE LEWIS: On the record, please.

We are here today for an oral argument. Will each of the representatives of the various organizations please identify themselves for the record?

MR. KOZELISKI: George Kozeliski representing Gallup-McKinley County School District.

JUDGE LEWIS: Thank you.

MR. VanAMBERG: Ronald VanAmberg representing the Zuni schools.

JUDGE LEWIS: Correct.

MR. SMITH: Mark Smith representing the assistant secretary.

JUDGE LEWIS: Thank you.

MR. TARNOW: Jonathan Tarnow representing the State of New Mexico Department of Education.

JUDGE LEWIS: Thank you very much.

Essentially in terms of how I would like to run this particular argument is I would first like to address the arguments raised by Zuni, then we will have any additional comments on the Zuni arguments that Mr. Kozeliski -- but Mr. Kozeliski, if you would like to add anything to Zuni's argument you may, and then I will hear from the Department of Education and then lastly from the State of New Mexico.

In addition, thereafter I will provide each of the parties an opportunity to add any additional comments. I do not impose any time limits on the arguments. I feel that this is an opportunity for you to address your issues to me, also an opportunity for myself to clarify any problems that I have, and I want all the parties to have a sense that they have tried to accomplish what they came here to do.

With that in mind, I would look to Mr. VanAmberg, please. If you'll come up to the podium?

MR. VanAMBERG: Yes, Your Honor.

Thank you, Your Honor. I'm Ronald VanAmberg and I represent the Zuni Independent School District on this appeal. The dispute is -- Zuni's main argument or relates to a dispute over what the state can take the impact aid which has been paid by the federal government for the purpose of compensating federally impacted school districts. The legislation which allows for this to take place says the state may take credit for the impact for the impact aid dollars.

However, there are certain requirements that have to be met and that is basically that they can have the money, take credit for the money if they are -- if they have developed and there is an existence a system which equalizes funding for all LEAs within the state.

The congressional requirement under 77809(b)(I) is that there has to be -- the state must equalize expenditures for free public education among local educational agencies, and I believe that this language is important because it sets out what the intent of Congress was when it allowed the states to take advantage of the impact aid dollars, and that is that there has to be equalization between the LEAs. And I think it's this

context and this theme that has to be looked at and considered when analyzing exactly how the formula which I think is at the heart of the Zuni case is developed.

If a state does not have equalized funding within LEAs the federal government does not step in and do anything. It merely says, according to its statutory scheme, that you then don't get the opportunity, State of New Mexico, to take advantage of the impact aid dollars which we believe rightfully belong otherwise to the impacted districts.

Bear in mind that the state is obligated under the New Mexico state constitution to educate its students under a uniform program of education. It's obligated to spend its own money. There is nothing which requires the federal government to come in and assist the state in performing its constitutionally mandated function.

Impact aid for the state is a windfall. It's a privilege, and it has to meet the test that Congress has set up which is basically there has to be equalization among the LEAs. Bear in mind that there are only three states that take advantage of this congressional offer, New Mexico being one of them.

The Zuni's main issue relates to the statutory language concerning how equalization is determined and looking at the language it is our position that one must continually reference the intent of Congress and the function of impact aid dollars. The function of impact aid dollars is to compensate school districts which are federally -- which are impacted by a federal presence.

Boiling this down, it means that the federal government is occupying the area. The federal government cannot be taxed. The federal government's land cannot be taxed, and there is

an inability of districts which have a federal presence to raise money through taxation, and that is generally the impact which the impact aid funds address.

The intent of Congress is to compensate these districts because of the federal presence. It's a fair approach. And the intent is that the money goes to the impacted districts and not to the state. I think it's important to always bear in mind that this is not the state's money that we're fighting over. This is the LEAs money we're fighting over. Congress intended to pay the LEAs and not the state.

And with that in mind I believe you have to look at the language which -- of the statute which relates to how you now develop the field of districts which you then compare in order to determine whether or not there is the 25 percent discrepance between the top district and the bottom district, and this is where the argument lies as to how this leveling off process takes place and how this formula is developed.

As Your Honor knows from the briefs, the state starts reducing students -- student counts. They rank the LEAs and then the state takes off 5 percent of the students from the top, 5 percent from the bottom. They draw the line there and they see if -- where the LEAs fit in that regard. Sometimes they fit in the middle, in which they move the line closer to the middle and lack of prosecution off the LEAs from the top and the LEAs from the bottom accordingly.

We do not believe that that is contemplated or even remotely suggested by the language of the statute. The statute states that you are to disregard local educational agencies with per pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the state. Breaking this down, one is to disregard the local

educational agencies, not students. Nothing else. Local educational agencies. Thus the focus is on the elimination of LEAs to smooth out the field.

The next question is the criteria used to eliminate the LEAs from the calculation, and the criteria used for this elimination is based upon calculations relating to per pupil expenditures or revenues above the 95th percentile or under the 5th percentile. Thus at this point the statute tells us to look at the LEAs themselves and their relative per pupil expenditures or revenues.

JUDGE LEWIS: The Department says in their view that the statute's ambiguous. Is that your view?

MR. VanAMBERG: I don't think it's -- it may be ambiguous to the precise formula that is to be used. I don't think it is ambiguous as to what is intended and what the component parts are of the formula, and I think if -- and I'll go into this carefully, Your Honor, because I've -- obviously I've given this a lot of thought and my thought on this has been evolving. And I think when you really look closely at the language, you look closely at the intent, I don't think that the ambiguity which the state suggests exists.

JUDGE LEWIS: Okay. So if I understand what you're saying in terms of whether the statute ought to be construed between LEAs and the students, the membership, you would say there's no ambiguity there?

MR. VanAMBERG: Correct.

JUDGE LEWIS: In determining the actual 5 percent and 95 percentiles it sounds as if your view is on that question there may be some ambiguity. Is that correct?

MR. VanAMBERG: I think there may be an argument as to whether there is an ambiguity. I think my position is that there is not.

JUDGE LEWIS: Okay.

MR. VanAMBERG: And I think I'll explain that later. I'm working my way into that.

I do -- I guess what I'm saying is that I see the argument for ambiguity. I do not see the resolution. Let's assume you find an ambiguity in there -- I do not see the resolution of this being to include a formula such as that being utilized by the state as being a reasonable solution to the ambiguity.

JUDGE LEWIS: Okay. But I want you to clarify exactly what you think is ambiguous at some point in your argument.

MR. VanAMBERG: All right. I -- as I say, the focus -- the direction of my argument will be toward trying to convince Your Honor that there is no ambiguity.

JUDGE LEWIS: Okay.

MR. VanAMBERG: And so that will be my direction, but I can understand better the argument that maybe there is an ambiguity because the precise formula is not set out with -- let's say by an example which reflects this, but I don't think that there is one.

I think the reason for this is that the statute tells us to look at the LEAs themselves and the relative per pupil expenditures or revenues. Eliminating LEAs by eliminating students has nothing to do with this requirement. The statute then continues and sets forth the standard against which these

pupil expenditures are measured, which are of such, quote -- or in brackets, per pupil expenditures of the state.

Again, the language I believe is clear that LEAs which are at the bottom 5 percent and the top 5 percent of all LEAs in per pupil expenditures -- and I think that's the clarity of the statute -- the top 5 -- you look at the top 5 and the bottom 5 percent relating to LEAs in per pupil expenditures, and you then eliminate those which are above the line and below the bottom line.

And there are only two -- and if you continue with this analysis there are only two component parts to the calculation. One is the LEAs and the other is the per pupil expenditures.

Now, once you get there I think it's appropriate then to take a look at the context in which this final calculation is developed. This is not a statistical exercise trying to find a statistical average in a wildly disparate field. These are supposed to be LEAs that are providing equal educational opportunities to their students. They're supposed to be equalized under New Mexico constitution, under the requirements of Congress if the state wants the impact aid credit.

And equal educational opportunities generally boils down to funding for student. The field is then further equalized because the states are allowed to remove a number of the idiosyncratic funding that takes place among students -- or LEAs which reflect density, sparsity, size, special education, and other factors, further homogenizing this field.

Then Congress gives the state the generous allowance of a 25 percent disparity between the top district and the bottom district, and we submit that there's no reason why in an

equalized educational setting which New Mexico purports to be that the top funded district should ever exceed the bottom funded district by more than 25 percent. Federal government then gives the state another break, which then allows for this 5 percent discount from the top and the 5 percent discount from the bottom.

Under the formula it requires -- or under the statute it says disregard local educational agencies, et cetera. It contemplates the elimination of LEAs, at least one at the top and one at the bottom. It eliminates those which are above 95 percent and below the 5 percent of quote, such expenditures.

The question is what is -- what do they mean by such expenditures? The only reference to expenditures is per pupil expenditures, and I'm submitting, Your Honor, that the only rational way and literal way to comply with this language is to take the top student expenditures and multiply that by 95 percent, take your lowest student expenditures in your LEAs, multiple that by 105 percent, and you eliminate the LEAs above and you eliminate the LEAs below.

I think that is a precise following of the language of that statute because you are then looking at -- you're eliminating A, LEAs, not students, and B, you are comparing LEAs' funding against the standards set by the highest LEA and by the lowest LEA, and that way you are now bringing the field -- you are compacting the field a little more. You're not knocking off 28 percent of the LEAs which the state -- funding for which the state formula accomplishes.

You are ending up with a situation where you may catch a few LEAs at the top and a few at the bottom, but then you do your comparison with the field which has basically already been equalized, and now there's an adjustment.

JUDGE LEWIS: Isn't percentile some type of statistical language? Don't they use that in statistics? So when I speak of 5 percent and 95 percentile, aren't they generally considering that you set up a scale with the LEA or student at the -- rank them at the bottom then rank them all the way to the top and then go through and add a cut-off line at 5 percent and 95 percent --

MR. VanAMBERG: Well, that's --

JUDGE LEWIS: -- which if I understood was your other argument in terms of how you eliminate the LEAs.

MR. VanAMBERG: That is the only other -- if there is an ambiguity that is the only other method that I can see, Your Honor, which would fit within the language there, and I was going to get to that.

JUDGE LEWIS: But your main argument of the two you feel most comfortable arguing to me the 105 percent-95 percent approach --

MR. VanAMBERG: I do --

JUDGE LEWIS: -- as that which is required by the statute?

MR. VanAMBERG: -- because it relates to a percentage of per pupil expenditures. Ninety-five percent of the per pupil expenditure -- and what this does, it inevitably avoids the situation we have now under the state's formula where when they have eliminated the LEAs from the top and the LEAs from the bottom, I believe it's Moscero -- or Raton at the top and then you knock it all the way down to Moscero and you've got a hundred percent disparity between now the

adjusted top ranked school district and the actual top ranked school district.

So they both -- there's a wide disparity here. There's a wide disequalization of funding now between actually the top ranked and the actual top ranked school district. I think this avoids that and I think Congress understood that this would be avoided by referencing the top expenditure. Then you take the 95 percent and you draw the line there and you compare the LEAs against that.

That in all likelihood would result in a disparity between the top -- the actual top ranked and the adjusted top ranked of maybe 5 percent, 10 percent, something like that, because of the way that line is drawn. And I think that that follows the language, and I think it more reflects the reality of what we are dealing with, which is Congress coming in and saying, Yes, you can have our money, but you need an equalized educational setting between your LEAs, and you're supposed to have that anyhow, according to your constitution.

We're going to allow you to make adjustments to even bring that field closer together, and you can do this final minor adjustment here and then we'll give you a 25 percent disparity allowance.

And I don't think, Your Honor, that -- first of all, the language does not support eliminating 28 percent of the school districts from -- and it doesn't support the kind of disparity that -- or the elimination of the disparity that actually exists in New Mexico by playing with a formula. I believe it's more appropriate to respect not only the language but the intent and purpose of this legislation which is to have a real equalization that exists among the LEAs in the state.

JUDGE LEWIS: Isn't your approach a substantial departure from what existed prior to '95 or '94 when this provision was enacted? In other words, under -- is it your present position under the disparity test much, much different than the disparity test that was in existence from '74 to '94?

MR. VanAMBERG: Well, what I'm trying to do, Your Honor, is read the -- is trying to figure out the language, which I think --

JUDGE LEWIS: No. I understand, but it seems to be a marked difference.

MR. VanAMBERG: It's a difference from the way that the states were doing it at the time, and unless Zuni stepped forward would be different from how they would be doing it today unless it were challenged and they would continue along that line.

JUDGE LEWIS: Okay. But there's nothing in the legislative history if I understand it correctly that indicates that Congress sought to make a marked change in how the disparity tests would operate. Is that fair to say?

MR. VanAMBERG: I don't think there's much -- and I've looked at the legislative history as much as I can -- I don't think there's much in the legislative history to -- which amplifies at all the language which ultimately appears in the statute.

JUDGE LEWIS: Okay. So there's nothing there one way or the other?

MR. VanAMBERG: I couldn't find it, and I --

JUDGE LEWIS: Okay.

MR. VanAMBERG: -- I spent a couple of days looking for it.

Under the state's calculation you've got 100 percent disparity between the top LEA and the adjusted top LEA. You've got a hundred -- if you work the formula as I suggest it should be worked and it doesn't skew anything. It just includes more LEAs. You've got 117 percent disparity between the top adjusted and the bottom adjusted LEA. That's not equal.

And again, I go back that the money, the impact aid money, does not belong to the state. It's something which belongs to the districts which have been federally impacted and this is not, I believe, the kind of equality that Congress has intended by working this kind of formula where you essentially eliminate the true nature of the disparities.

And as I mentioned to the Court -- to Your Honor previously, the only other method that I can see would be the same way that it's worked when students are in school and you ask what percentile are you in and, Well, I'm in the 95th percentile in my class, or I'm in the 50th percentile in my class. And what you do there is you rank the students and then you work your percentage on the students on the top and the students on the bottom and you find out who's in the 95th percentile and who's in the 5th percentile.

And that I think is also -- although I don't think it's as pure and accurate, I think it's -- if there in an ambiguity I think that's the only other way that this formula could be worked, and I -- which would be to rank the LEAs and then by -- in accordance with their relative per pupil expenditures

and then you eliminate the top 5 percent. You eliminate the bottom 5 percent, and then you work your figure, which we have discussed in our briefs.

If there is an ambiguity I believe that the two ways that I have suggested are the only two ways which make sense and which respect the language of the statute. If there is an ambiguity I do not think it is then justified for the State of New Mexico or the Department of Education to then say that they have carte blanche to come up with whatever formula they wish and then work a -- come up with a formula which creates -- which masks a true disparity in this state between equalization and which finds absolutely no support in the statute which was enacted by Congress.

JUDGE LEWIS: Let me ask you something. Would you agree that there's an obvious difference between how the disparity test is computed under the regulations in the appendix in the statute?

MR. VanAMBERG: Yes.

JUDGE LEWIS: Okay. And so there is an -- the reg is in effect in conflict with the statute?

MR. VanAMBERG: That's our position.

JUDGE LEWIS: Okay. Now, there's a point that the department touched on, and unfortunately they did it in their reply brief, and this has to do with the question of whether I have the power to declare a regulation invalid. It was only addressed in a very short-shrift fashion by the department. You haven't had an opportunity to respond to that.

I would like to give you an opportunity as well as any of the other parties here an opportunity to file a supplemental memo if you would like, and you can take for my consideration here three weeks to file it.

But let me say this, that the power to invalidate a regulation as I understand it stems from one of two means. You either have to have the inherent authority to invalidate the regulation, and I understand that to mean essentially that it goes to our Article 3 type judge, a judge that has a lifetime tenure and whose salary cannot be diminished. Unfortunately, I don't fall in either one of those categories, especially the salary part.

The other source of authority to invalidate a regulation is one that's been specifically granted by statute, and there have been occasions in which an administrative body in effect has been granted that authority. Presently I don't think I have that authority. If you can find something which states or which shows that I do, I'm open to consider it.

Let me first start you out and point you to an opinion I issued, and it's called the Lemont Township. It was an impact aid case -- you actually can -- we have a website which has our decisions on it. It's called www.ed-oha.org.

MR. VanAMBERG: Are these dashes or dots?

JUDGE LEWIS: It's www.ed-oha. --

MR. VanAMBERG: dot org.

JUDGE LEWIS: - dot org.

MR. VanAMBERG: Okay.

JUDGE LEWIS: I wrote that in '92 and it was affirmed by Secretary on May 4 of '92. The secretary's affirmance is not at that website, but he really didn't add much beyond what I said there. That might be a point for you to start.

MR. VanAMBERG: Okay.

JUDGE LEWIS: But the short of it is is that I sit as an administrative law judge and hear this case under the Administrative Procedures Act. Then one of the provisions in there says that essentially I issue my decision subject to the published rules of the agency, and in Lemont I interpreted that to mean the regulations of the agency.

And so if there was a conflict between the regulation and the statute, I felt essentially that there was nothing I could do about it, that I had to go under the regulation and that your remedy lies going to federal court on such an issue.

Okay?

MR. VanAMBERG: I will take a look at that, Your Honor.

JUDGE LEWIS: Okay. All right. Before you take off, let me see if I've got any other questions. Do you have anything that you want to add on the other issues that you had?

MR. VanAMBERG: I would rely on the briefs for that, Your Honor.

JUDGE LEWIS: Okay. (Perusing documents.) I would say this and for the purposes of the other people in the oral argument. At this point I tend to agree with you on the

teacher index question, that once it's been factored in and when you start to take out the special ed kids from the formulas, that along with that you also have to take off any additional revenues in effect thrown off by the teacher index.

I guess that's about it. Okay. Thank you.

MR. VanAMBERG: Thank you.

JUDGE LEWIS: Does Gallup have anything they want to add to the membership question versus -- the LEA versus the student membership?

MR. KOZELISKI: No, Your Honor.

JUDGE LEWIS: Okay. Thank you.

Mr. Smith?

MR. SMITH: May it please the Court, my name is Mark Smith. I represent the assistant secretary in this proceeding.

The paramount issue in this case is whether it was unreasonable for the secretary to interpret the percentile exclusion of the statute in such a manner as to assure that the disparity test is an effective equity measure. In order to fulfill the statutory purpose the secretary has interpreted the statute as you've heard to mean that correct percentile exclusions are the specified percentiles of the total number of peoples in attendance in the schools of the state.

This method calculates the disparity based on revenues per pupil organized on an LEA basis. That is the data is reported and organized on an LEA basis after removing the statistically anomalous outliers based upon student population -- statewide

student population. This avoids the unfair and inconsistent results that can otherwise occur due to the happenstance of the size of particular LEAs and their location on the ranking that's under examination here.

This interpretation derives from the practice in the field. It's been incorporated into the department's regulations and applied consistently by the secretary since he originated the disparity test including the percentile exclusion in 1976. It's also been applied consistently since the enactment of Section 8009 in 1994.

Prior to 1994 the situation was that you had three equity tests that were included in the department's regulations under the general directive -- under the predecessor statute to define what it means to equalize expenditures.

In 1994 Congress repealed two of the tests finding them not to its satisfaction, and the third test, the disparity test, it codified into statute law without any indication that there was a desire to change the way in which it had historically been applied for almost 20 years at that point by the secretary.

Because the interpretation at issue in this case was embodied in the department's regulations it was binding upon the secretary and he would have had to violate his own regulations in order to take the position or apply the position or the methods urged by the Zuni district, and we respectfully submit and we will submit a brief on this as well that it is also binding upon the tribunal.

JUDGE LEWIS: What happens if in this case -- you've indicated in your brief that it was your view that the Congress made a mistake, that there were certain words in the statute that they left out or the draftsman changed the language in,

and as such there was substantial difference between what you said Congress intended to put in there and what Congress in fact put in there.

MR. SMITH: I think that in this highly technical field they weren't 100 percent accurate with their language. I think --

JUDGE LEWIS: All right. Can you take me through the statute and show me how using the language in the statute you can come to the result under the regulation?

MR. SMITH: Simply use the language of the regulation.

JUDGE LEWIS: In other words, the statute does not support the regulation? It's different?

MR. SMITH: It is different.

JUDGE LEWIS: And it calls for the result that Zuni asks for?

MR. SMITH: No, it does not, because I think that you have to read this particular language of the statute in -- with a view to its purpose, to the statutory purpose.

JUDGE LEWIS: Well, what's the statutory purpose?

MR. SMITH: The statutory purpose is for there to be a test that is effective in distinguishing equalized states from those that are not, and --

JUDGE LEWIS: Okay.

MR. SMITH: -- under the methods put forth by Zuni that's not the result that obtains. You are not correcting the essential defect in the disparity test and all range measures, for that matter, that by looking at the disparity, looking at some district near the top of the ranking and some district near the bottom of the ranking, you're putting undue influence on the extremes and not -- at the expense of looking at the entire range of expenditures effectively.

When practitioners in the field apply measures of this kind this is what they do. This is not made up out of whole cloth. And --

JUDGE LEWIS: But what Zuni's other argument is is that you essentially line up the LEAs according to their per pupil expenditures and then you essentially draw the line, 5 percent, 95 percent, which is the same approach that you use in the membership. The only difference is that you're just simply dealing with fewer LEAs as opposed to the number of members.

MR. SMITH: Well, the suggestion that it be done simply on the basis of LEAs -- and for 89 districts in New Mexico it works out to about five districts at either end -- that argument was rejected in 1976 in the rule making because the results are so different from state to state depending upon, as I mentioned earlier, the happenstance of which districts are at the top and bottom of the ranking? Are they big districts? Are they little districts? The results are inconsistent and unfair across the board.

So that method was rejected as not being fair and not being --

JUDGE LEWIS: But maybe this is what Congress told you. You've got to look at the statute, and if the statute says the moon's made out of blue cheese then it's made out of blue cheese as far as everybody's concerned.

And I've got a real problem if I have to decide this thing if I have to choose between what's in the statute and what's in the regulation. If you can show me the statute's ambiguous then under normal rules of construction you can then move over to the regulations which then interpret an ambiguous statute.

MR. SMITH: I can only do that --

JUDGE LEWIS: The problem is I don't see the ambiguity of the statute.

MR. SMITH: The only way I can do that is by reference to the statutory purpose. We've tried to provide evidence in the record to indicate that to give the disparity test utility this is the only possible interpretation.

JUDGE LEWIS: Well, you better give it utility than give it utility that you don't want.

MR. SMITH: Well -- or that Congress intended.

JUDGE LEWIS: But the only thing that we have from Congress is what Congress said in the statue.

MR. SMITH: Well --

JUDGE LEWIS: And if we go with Justice Scalia he would say, That's it.

MR. SMITH: I think we can read it reasonably in the light of the history, and the history, as I indicated, was that this test existed for a long period of time, presumably Congress knew how it was being applied. They had some dissatisfaction with the other two tests that were being applied at the time. They eliminated them. They essentially codified this one, did not indicate any change in the course.

JUDGE LEWIS: All right. So what you're saying is the statutory provision has to be construed in light of the total provisions that govern --

MR. SMITH: Yes.

JUDGE LEWIS: -- this question?

MR. SMITH: Yes.

JUDGE LEWIS: Okay. Go on.

MR. SMITH: Now, Zuni's argument that the secretary's interpretation is erroneous is very simply and very tightly focused. It's so tightly focused that the practicalities of applying the disparity test and the purpose of the statute are really beyond the OEA's consideration. They have a simple mantra and that mantra is that the language of the statute speaks in terms of such expenditures -- such percentiles of expenditures or revenues in the state.

But as I mentioned, at times we're all guilty of speaking with imprecision, and that's all the more so in a very technical field such as this one. Their argument begins to lose some traction when they actually get down to the nuts and bolts of trying to apply the test.

There's been some discussion this morning of the two methods that they have suggested. I see that the school district has finally come down more on the side of one than the other, but I would submit that neither of them are consistent with the language of the statute. And if they're not concerned about the practicalities of application it seems to me equally clear that they're not concerned about the statutory purpose.

They say again and again, Well, there's just too many districts that are being excluded by this method, and they're looking at the New Mexico example, of course from state to state again, according to the ranking and whether they're big districts at the top or small districts at the top. It's going to be different numbers of LEAs excluded. It's not always going to be as big a number as is the case here.

Sometimes it might be even a bigger case, but the point is the method has a purpose, and the purpose is to avoid reliance on anomalous results, and unless you do that you're not going to have an effective test. You're not going to be able to distinguish those states which are entitled to the other policy that exists under the impact aid law to prevent impact aid from undercutting their efforts at equalization.

It's a truism that impact aid is intended to compensate local school districts for the federal presence in one way our another, but that's not the only purpose of the statute, and I think we need to keep this statute -- this statutory purpose in mind when interpreting this particular statutory provision.

JUDGE LEWIS: Yes. But what they're really saying is that the primary function of impact aid is, as you have said, to compensate the school districts for the federal presence. That's the general rule and that's the statute.

Now you have an exception and when you're dealing with an exception and exception must be narrowly construed, and also in terms of that narrow construction given to the exception it has to be if the states have an equalized system, and they're just simply saying, Look, in order to get in under the exception you must be extremely well equalized I guess is the best way to put it. And therefore, there's nothing wrong with having a high standard as to whether you're equalized. In fact, that comports with the general intent of the overall statute.

MR. SMITH: But we have to take the statute as Congress intended it. They're equally unhappy with the 25 percent disparity level. We heard them say that this morning. To say that it must be highly equalized is not a refutation of what congressional intent was here. Congress clearly did not have in mind the high level of equalization that would satisfy these districts here and probably many other districts --

JUDGE LEWIS: Well, what they had in mind was the 25 percent --

MR. SMITH: Correct.

JUDGE LEWIS: -- which they said. Now, the question is upon what basis do you compute the 25 percent?

MR. SMITH: Correct.

All right. As I've indicated, the test was originated by the secretary. It's long-standing practice, and we would submit that as such it's entitled to a degree of deference by this tribunal. It's consistent with the practice of scholars in the field. There's evidence in the record here that indicates that the purpose of the exclusion is to make the test reliable by

preventing consideration of statistically spurious results. That the disparity test in particular requires such a device to prevent it from being unreliable.

That particular method that the secretary employed here is the correct way of doing it, where you're concerned with student equity and that the two methods being advanced by Zuni are ineffective and do not prevent the test from undue reliance on those kinds of results.

Zuni pays a great deal of lip service in its briefs to the notion that Congress intended a narrow exception, but what they really are seeking is to have this tribunal convert the statute into a mere illusion of an exception. That would not be consistent with the purposes of the statute. New Mexico is a highly equalized state. If it is not able to qualify under interpretation advanced by the school districts I don't believe that any state would qualify.

Let me just say a few quick words on their other arguments. Really I'll just touch on one other argument that they made in their reply brief to the effect that they are trying to interpret the statute to say that if a state avails itself of the percentile exclusion it is not permitted also to avail itself of the exclusions for cost differentials, which I'll discuss in more detail later on when you turn to the Gallup arguments. But there's nothing in the language or the logic of the statute that would support this outcome.

First of all, if you look at the statutory provision in question the two factors are listed there joined by the word and, which clearly indicates that in applying the test the secretary is to make both adjustments, not just one of them as Zuni argues. But even -- and I could stop right there -- but even apart from the language of the statute Zuni's argument

fails because it's illogical. The percentile exclusion, as I've said several times now, is meant to preserve the integrity of the test by preventing the consideration of anomalous results.

So why under any set of circumstances would Congress make it the option of the LEA to say, I'm going to undercut the validity of this test. I'm going to choose one over the other. I'm not going to use the percentile exclusion and we'll just go with anomalous results here. It's illogical. It's not consistent with the statutory language. It's not consistent with language.

The cost differential provision has a totally separate purpose, and I'll get into that more later on. Its purpose is to allow states to provide additional funding to school districts in recognition of additional costs associated with LEAs and children with particular characteristics. There's simply nothing in the statute that indicates that it's an either-or situation and if you look at the stipulations the districts have stipulated in paragraph 17 that the secretary is to apply both factors, and so I would submit that there is no merit to this argument.

Judge Lewis, at this point would you care for me to discuss their arguments about the kindergarten offsets -- Zuni's argument about the kindergarten offset and the cost differentials, or do you want to defer that?

JUDGE LEWIS: No. We can get into that at this point --

MR. SMITH: Okay.

JUDGE LEWIS: -- but before you leave, since you brought up a validity question, let's hear what you have to say about it and my power to invalidate.

MR. SMITH: Our view is that, first of all, it's not warranted in this case, but even if it was that just as the secretary was bound by the regulation to apply this interpretation in this case, which he did do, that you also are bound by those regulations with respect --

JUDGE LEWIS: I have a question. You brought this up in your reply brief. Why so late?

MR. SMITH: It wasn't until that point that I at least felt that they were clearly articulating their argument to be that the regulation violated the statute. I may not have perceived it as early as I should have, but that's why.

JUDGE LEWIS: Okay.

MR. SMITH: Turning to their argument about the kindergarten students, they argue that because -- Zuni argues that because the New Mexico funding --

JUDGE LEWIS: Excuse me, Mr. Smith, one moment.

Yes, sir?

MR. VanAMBERG: To avoid this, the legislature recently passed a statute allowing full-time kindergarten in certain districts -- the Zunis included in that, so it's no longer an issue.

JUDGE LEWIS: All right. So you are conceding that issue?

MR. VanAMBERG: We're conceding that because they now do get the funding on a full-time basis for kindergarten. The issue was they were only getting funding half time --

JUDGE LEWIS: Okay. So you're withdrawing your argument with regards to that particular issue?

MR. VanAMBERG: Correct.

JUDGE LEWIS: Okay.

Move on.

MR. SMITH: All right. Turning now to the cost differentials, the law recognizes that it's not inequitable to treat dissimilarly situated students dissimilarly and therefore the statute directs the secretary to, quote, take into account the extent to which a program of state aid reflects the additional costs of providing free public education in particular types of LEAs such as those that are geographically isolated or to particular types of students, such as children with disabilities.

What this means is that in applying the test the secretary is not to penalize states for recognizing extraordinary needs for particular students and particular LEAs and providing additional state support in order to meet those needs. And the regulations operationalize that directive by excluding cost differentials -- special cost differentials from the revenues for current expenditures that are included in the test.

So if you are -- if something is a cost differential it's appropriate under the regulations to simply not include those revenues in the test. There are three cost differentials at issue here argued by Zuni.

The first is the save-harmless revenues. These are revenues that are paid to very small districts that are experiencing precipitous declines in student population. This

is precisely the type of thing that was intended to be included in cost differentials. It's a characteristic of school districts and it was appropriate for New Mexico to recognize extraordinary costs that accrue at districts of this kind and provide additional weights for them.

The same is true with respect to small and rural school districts. New Mexico law again provides some additional support to these districts in recognition of the fact that they cannot take full advantage of economies of scale that larger districts are able to; the fact that rural districts are apt to be more isolated, have higher transportation costs, that kind of thing. Again, this is a classic cost differential and the treatment by New Mexico in its data was appropriate under the statute.

With the TEI the situation is a little bit different. Most of the TEI was not considered to be a cost differential and was included in the state's data. There is a small portion of that that Zuni is arguing should have been excluded. The portion of the TEI that's multiplied against special factors that were excluded as cost differentials, and there were others than the two I mentioned here, handicapped students and I don't know what the others were, but basically they're arguing that the TEI as applied to those other weights that were excluded from the formula also should have been excluded as the formula.

The state has not in this data submission argued that the TEI is a special cost differential. It has not opted to attempt to qualify for that kind of treatment here. Our position is that it is a revenue under the definitions and has to be included in the data, including the weight applied to the weights that were excluded, if I'm being clear there.

And furthermore, to the extent that the inclusion did anything to the data here it subjected more revenues to the

disparity test. In other words, it would tend most likely to overstate rather than understate disparity and so --

JUDGE LEWIS: But what Zuni is arguing is that if you're dealing with a typical student they don't have a problem with that in terms of teacher index. However, when you're dealing with special ed students against which the index is applied and then you take out the special ed students, you then must also take out the effect of the teacher index on those special ed students, and that New Mexico has not done.

MR. SMITH: Correct.

JUDGE LEWIS: So you're saying that it is correct for New Mexico to do what they did?

MR. SMITH: Because there is no indication or support for the argument that this was a special cost differential. In other words, it's a state option to exercise and they did not exercise it here.

JUDGE LEWIS: Okay. You've lost me. If you had a special ed student, one member, you apply the index towards that membership and then you end up with an adjusted membership or something like that.

MR. SMITH: As to those students.

JUDGE LEWIS: As to -- okay. Now, if you are then going to take out the revenues attributable to the special ed students, part of those revenues --

MR. SMITH: Well, you're only taking --

JUDGE LEWIS: -- or is that which has been kicked off by the teacher index. So I don't -- I see in my view Zuni's absolutely right. If you're going to put in special ed students and then you're going to take special ed students out, you also have to take out the effect of the index --

MR. SMITH: But you're not taking all the special ed students out. You're taking out the additional weight that they receive by virtue of their being special ed students, but they're also in there -- still in the disparity data as -- I don't know how to say it other than it's kind of not a very nice way of saying it, regular students.

They have a weight in there as a student but they don't have a weight in there as a special ed student. The extra weight -- the extra compensation that the school district is providing for that -- by virtue of that characteristic is being removed, but not the basic revenues that they have as a school district -- as a student. And so --

JUDGE LEWIS: I looked at the computations and it seemed to me that under the computations that when they went to compute revenue per pupil they took out all the revenues attributable to the special ed student because they cranked it out using the membership units and the program costs per unit, and in doing that they then left in the effect of the index.

MR. SMITH: I'm going to have to defer to the state on that.

JUDGE LEWIS: Okay. That's the way that I read the computations in there, and in that regards I think it's perfectly consistent to do what Zuni asks.

I've got one question on the save harmless. There seems to be a difference of opinion between you and New Mexico in terms of what provision under the New Mexico statute is applicable here for the save harmless exception.

You cited in your brief 22-8-25(d)(3), and New Mexico cites 22-8-25(g). Who's correct?

MR. SMITH: They're the experts on New Mexico law, clearly.

JUDGE LEWIS: So are you deferring to them to explain?

MR. SMITH: Yes.

JUDGE LEWIS: As opposed to their choice of the statute?

MR. SMITH: Both.

JUDGE LEWIS: Okay.

MR. SMITH: I have nothing further.

JUDGE LEWIS: I've got one question, and I want you to address this in your supplemental memo, and that is where it is clear that there's a difference between the statute and the regulation, which provision do I then proceed under? And I've got one other question. Do you consider the appendix as part of the regulations?

MR. SMITH: Yes.

JUDGE LEWIS: Is there any different -- entitled to any greater or lesser or the same weight as the regulation?

MR. SMITH: Same.

JUDGE LEWIS: The same? Okay. And do you believe that it's appropriate in an appendix to put in there an interpretation of the statute as opposed to put that same interpretation in the body of the reg?

MR. SMITH: I think here where the appendix is the nuts and bolts application, and this deals with the nuts and bolts issue, it was appropriate to do it that way.

JUDGE LEWIS: Okay. And would you say that your appendix is consistent with what you said in the body of the reg?

MR. SMITH: Yes.

JUDGE LEWIS: And what's in the body of the reg is the same as what's in the body of the statute?

MR. SMITH: It paraphrases the statute.

JUDGE LEWIS: So are you saying then that is the reg interpretive of the statute?

MR. SMITH: If by the reg you're referring to the --

JUDGE LEWIS: I'm sorry. The appendix.

MR. SMITH: Yes.

JUDGE LEWIS: Okay. Do you have anything else you want to add on this?

MR. SMITH: No. Thank you.

(Pause.)

MR. TARNOW: Good morning, Judge Lewis.

JUDGE LEWIS: Good morning.

MR. TARNOW: May it please the Court, my name is Jonathan Tarnow with the law firm of Brustein & Manasevit, and I'm here today representing the State of New Mexico Department of Education.

I wanted to introduce a few other folks who are here with us today from the department. Seated at counsel table with me is the Honorable Michael Davis, superintendent of public instruction for the state --

JUDGE LEWIS: Good morning.

MR. TARNOW: -- and Ms. Arlene Strumos, who is general counsel for the department.

JUDGE LEWIS: Good morning.

MR. TARNOW: Behind the bar is also -- I'll go in order of our right to our left -- Ms. Brenda Suazo Giles, who is executive budget analyst; Dr. Kathleen Forrer, chief financial officer; and Mr. Larry Mirebol, director of the school budget finance analysis branch.

And to the extent -- based on the arguments that we have had so far this morning, I don't think we'll get into some of the details of the state's calculations of its own program costs, but to the extent that you have any technical questions or matters of state policy which I don't feel fully comfortable answering, with your permission I would defer to the experts

from the state. But I have a feeling we won't get into those very technical issues based on what's been said already.

And as an initial matter, the cite that you just referenced regarding the save harmless, I must apologize. Mr. Smith is correct in his citation. That is a drafting error on my part, and I apologize for that.

Your Honor, as you have heard from counsel for both Zuni and the assistant secretary for elementary and secondary education this matter essentially regards the assistant secretary's fiscal year 2000 impact aid certification of New Mexico as an equalized state under Section 8009 of the ESEA and the applicable regulations.

As you know and as has been discussed this morning, states are generally not permitted to reduce state funding for LEAs because the LEA receives federal impact aid funds, and while that is the general rule, Section 8009 of the ESEA contains and exception which states that upon certification by the assistant secretary an equalized state may take into consideration the impact aid funds when calculating state aid.

While this does reduce, to use that word liberally, the amount of state aid the LEA may otherwise receive, the purpose of this exception is to prevent gross disparities in LEA funding in states that have attempted to equalize their own funding for all students within the state. In other words, Section 8009 recognizes that a state's efforts at providing equal educational opportunity for all students can be frustrated where some school districts in an equalized state would receive federal impact aid funding resulting in them having far more total funds per student than districts without that impact aid revenue.

In practice the exception provided, as has been said this morning by Section 8009 is not widely used, as only three states even qualify under the criteria. In order for the assistant secretary to grant the certification the state must provide evidence that the disparity in the amount of current expenditures or revenues per pupil among LEAs in the state is no more than 25 percent, and if that disparity calculation permits, the assistant secretary grants his or her certification.

JUDGE LEWIS: And is that certification made on an annual basis or is it made on some other basis?

MR. TARNOW: It's per fiscal year, Your Honor.

JUDGE LEWIS: So therefore when you go to compute the disparity test or the other tests that we have in here it's done on an annual basis?

MR. TARNOW: Right. And it uses the financial data from two fiscal years back for the current fiscal year. Impossible to do it based on projections for the current year and so the statute and regulation set forth that forward application of prior year statistics.

Essentially, Your Honor, I submit that certification was correct for essentially two reasons. First, New Mexico's calculation of its per pupil revenue is consistent with the applicable regulations, and this issue gets to the adjustments that were made et cetera. The state on this point would rely on its brief and really turn the focus to the second issue, which is the application of the methodology for determining disparity on the 25 percent test.

JUDGE LEWIS: Okay. Before we get to that, let's just resolve the teacher index. Do you think that New Mexico treated that correctly?

MR. TARNOW: The state has treated it in the way that it has done based on a 1992 directive from the department. In fact, Your Honor, if the state were to do as you suggest and remove all of the resulting adjustments, when it removes those students if they would go back and also remove the teacher and experience index in toto, the effect is to decrease the disparity even further. And the state has submitted with its initial brief at Exhibit 3, Attachment 4 and example of how that plays out.

So the state would not contest doing that. The state has been acting since 1992 under direction of the department. It was told that to do what you suggest was not a proper cost differential, but we would not object to doing so.

JUDGE LEWIS: I'm sorry. Let me see if I understand correctly. In terms of for lack of a better term the typical student, there's no question there that the index is included. Correct?

MR. TARNOW: Correct.

JUDGE LEWIS: Okay. And you've done that because the Department of Education has told you to do that? Okay. Zuni's question came up as to the -- I think that basically the special ed students --

MR. TARNOW: Uh-huh.

JUDGE LEWIS: -- and there's a point in there which they treated a little bit differently in terms of the cost differential.

Now, what if any teacher index should be backed out for those special ed students?

MR. TARNOW: Well, as it is done, as I understand the way it is --

JUDGE LEWIS: Tell me how it's done then tell me --

MR. TARNOW: If I understand how it's done correctly -- and it's highly technical -- when the special cost differentials are pulled out for those students they are pulled out -- it's usually kind of a tax term -- below the line, after the original adjustments are made. But based on the 1992 direction the state does not go back into the early part of those adjustments where the revenue program was calculated to revisit that and pull it out at that point.

JUDGE LEWIS: Okay.

MR. TARNOW: It's left in -- I want to say partially left in.

JUDGE LEWIS: Okay. But when they pull it out do they pull out the effect of the teacher index on that amount that's pulled out?

MR. TARNOW: I do not believe so under the current direction from the department.

JUDGE LEWIS: Do you not think it's appropriate to pull it out? If you're going to put it in and then take it out since

the teacher index is a factor that's applied to something, it seems to me that if you're going to take out part of that something you also take out the effect of the-teacher index in that something.

MR. TARNOW: In that something. And that's an appropriate interpretation, Your Honor, and it's interpretation the state does not disagree with. The state has not been following that interpretation based on the '92 direction of the department. The state is willing to do that if you find that its current practice is inappropriate.

JUDGE LEWIS: Okay. Yes. It doesn't have a dramatic effect. That I've seen from the calculations.

MR. TARNOW: Uh-huh.

JUDGE LEWIS: Okay. You can move on to the other argument. And by the way, as I read your brief on the main issue, you seem to think that the statute is consistent with the use of the student population, and I want you to show me how you get there under the terms of the statute.

MR. TARNOW: Well, actually, Your Honor, since submitting -- I think we've all done a lot of thinking about this issue and this conflict that seems to appear, and I'm not certain that we would state that so plainly at this point.

It is arguable that there's a difference, and we would defer to Mr. Smith on the department's interpretation. However --

JUDGE LEWIS: Hang on. Mr. Smith says that there's been an error made in the statute and essentially that there is a difference, basically that the statute says you look at the LEAs and the regs say that you look at the membership.

MR. TARNOW: Actually, Your Honor, the statute doesn't specifically state you look at the LEAs, and I have to respectfully disagree with Mr. VanAmberg.

JUDGE LEWIS: All right. I want you to tell me what your interpretation is and show me how you get there under the statute.

MR. TARNOW: Under the statute, which is reflected in the text of the regulation and not in the appendix, it states to excludes those LEAs at the 95th percentile and 5th percentile, or per pupil revenues or expenditures in the state. And those last three words are critical, Your Honor, because those are the three words that would require under that scenario to look at all the expenditures across the state, not just the expenditure of the LEA at the 95th and the LEA at the 5th.

To follow that methodology, which is not what has been done in this case, you would add up -- you would total the entire amount of expenditures in the state and determine where the 95th percentile falls and the 5th -- 95th and 5th percentile fall within the ranking of LEAs, and not to merely look at the revenue per pupil at LEA 95 and at the 5th. There's a difference there between adding up the revenues state wide and just comparing the revenue per pupil at the 95th and 5th LEAs.

JUDGE LEWIS: In other words, you're saying that you make up a list and for each LEA you put their revenues out there?

MR. TARNOW: Well, there's no doubt that a list has to be made. You have to rank the LEAs per -- by their revenues per pupil, per pupil expenditure.

What -- an alternative interpretation we're positing here now would be to look at all of the expenditures per pupil in the state -- or look at all the expenditures in the state --

JUDGE LEWIS: Okay. By that you mean expenditures per pupil?

MR. TARNOW: Correct. All the expenditures that are included among all the LEAs.

JUDGE LEWIS: So in other words you have a list that says school district one, $5 per pupil, number two, $4.50 per pupil. You make up a list like that?

MR. TARNOW: Correct.

JUDGE LEWIS: Okay.

MR. TARNOW: And then if I understood Mr. VanAmberg correctly, what -- how he would interpret that --

JUDGE LEWIS: I want to know how you interpret --

MR. TARNOW: Okay. How I would interpret that is you then have to multiply the expenditures per pupil in each LEA, so you have your ranking, but the number of pupils in that district to get the total amount of revenue. You're doing the math backwards.

JUDGE LEWIS: So you're doing it revenue per LEA?

MR. TARNOW: Looking at how much is spent on the top 5 percent -- look at how many -- we had certain number of -- some certain of revenues spent in the state --

JUDGE LEWIS: Are you trying to eliminate 5 percent of the totals revenues spent by Arizona schools at the top and 5 percent of the revenues spent by all the schools at the bottom?

MR. TARNOW: That would be an interpretation that we would suggest --

JUDGE LEWIS: And how you get that based on the language, because it says disregard local LEAs with per pupil expenditures. It says -- you're thinking per pupil expenditures as being total expenditures?

MR. TARNOW: Well, the per pupil expenditures -- I think we would emphasize that the final language is in the state. You have to look at all of the expenditures in the state to determine where that 95th and 5th percentile lines should be drawn.

JUDGE LEWIS: Okay. So --

MR. TARNOW: Because funding is by student. The funding is driven by student, not by LEA, and so we have to look at where the student receipt of money statewide.

JUDGE LEWIS: So basically you take the total amount spent in the state on all the students, say it's $100, and you would then draw up a list and at the bottom of the list you would have the school which spent the least total amount on its students. That would be the school at the bottom.

Then the next school would be the school that spent the second least amount?

MR. TARNOW: That's correct.

JUDGE LEWIS: Okay.

MR. TARNOW: Your Honor, we're not --

JUDGE LEWIS: So basically your list in great part would be based upon then essentially from a practical purpose based upon a ranking of schools according to student population basically.

MR. TARNOW: Student population and taking into consideration how much funding per student is received.

JUDGE LEWIS: Yes, but the funding's not going to be all that much different.

MR. TARNOW: The state is actually done this calculation --

JUDGE LEWIS: But that's how you interpret this statute?

MR. TARNOW: That would be our interpretation of --

JUDGE LEWIS: Which is then inconsistent with the regulation. Right?

MR. TARNOW: Arguably --

JUDGE LEWIS: Arguably?

MR. TARNOW: Well, it's -- again, Your Honor, we would agree with the department that the only reasonable way of determining disparity is on a per pupil expenditure and considering the students and not the LEAs. And even under the scenario we've just been discussing, New Mexico still satisfies the disparity calculation.

As you've raised, the issue before us is calculated in that the regulation and specifically the appendix arguably conflicts with the expressed statutory language. We concur with the department that it's a reasonable interpretation and we submit that the state is required to follow the regulation as it's stated. And the regulation itself, the text of the -- the body of the regulation specifically states that the methodology for determining the disparity is set forth in the appendix.

So we would therefore agree with Mr. Smith that the regulation -- the appendix to the regulation is in fact part of the regulation. The methodology in the appendix was included in the 1995 Federal Register rulemaking process. It is not, to use an example, it's not an interpretive memorandum that was issued by the department interpreting what the body of the regulation states. It is part and parcel of the regulation.

And so the real question here is whether or not -- from the state's perspective whether or not the state followed the regulation as instructed, and that includes the methodology that was in fact used.

Either way, whether you adhere to the methodology in the appendix or you take the alternative construction of the statute and regulatory text, New Mexico has satisfied the 25 percent disparity by a significant margin, and therefore, if there was an error it's a harmless error, because New Mexico -- the certification still would have been granted.

JUDGE LEWIS: But it sounds as if your view is that the statute in the body of the reg as opposed to the appendix calls for a result different -- or method different than what's been adopted in the appendix.

MR. TARNOW: I would -- I can see how -- I could make an argument that is the case.

JUDGE LEWIS: Don't make an argument. Tell me what your position is.

MR. TARNOW: Our position, Your Honor, is that the state followed the regulation and the regulation includes the appendix.

JUDGE LEWIS: Okay. I've got that. But now, how is that consistent with the statute, your interpretation of the statute?

MR. TARNOW: Literally, on the face of the words, perhaps not, probably not. But again, looking at the overall intent of the impact aid program, the fact that if we were to read this exception from Section 8009 in a way that the districts would have us read it that perhaps no state would qualify and the purpose of an exception is therefore undercut, and the purpose of an enacting it by Congress is then called into question.

Clearly, there is room -- we had it here today -- there is room for debate on that. Our position is that this interpretation as embodied by the appendix, as promulgated by the secretary with the regulation is an appropriate perhaps one of two or three -- it's an appropriate implementation of the statute, even though you could argue it otherwise.

JUDGE LEWIS: Okay. Now, what about my power to do something that is inconsistent or ignores the regulation?

MR. TARNOW: Well --

JUDGE LEWIS: And I'm especially interested in your viewpoint because you do appear as counsel for other states and other school districts, and so sometimes you may be on the other side of the fence.

MR. TARNOW: Actually --

JUDGE LEWIS: So if somebody's going to shoot at me squarely I think it may be you.

MR. TARNOW: And Mr. Smith and I talked about that. He was first to realize how I have a certain --

JUDGE LEWIS: That's good.

MR. TARNOW: -- bias against the department, as you know. But nonetheless, it's the position of myself and my colleagues that yourself and your colleagues in the Office of Hearings and Appeals do not possess the requisite authority --

JUDGE LEWIS: My colleagues in the Office of Hearings and Appeals are not administrative law judges. Okay? So we can exclude them.

MR. TARNOW: Okay.

JUDGE LEWIS: Because this is being heard under the Administrative Procedure Act.

MR. TARNOW: I would agree with your statement earlier, Judge Lewis, that there is not the authority either in the impact aid statute, regulations, or some other authority for you to set aside this regulation as inconsistent with the statute. We'll be happy to provide a supplemental brief as suggested, but I would go back to the very case you cited, Lemont, the

case cited by the department, that the decision to be made here today albeit an uncomfortable one for you certainly is whether or not the state's process and the department's certification complies with the reg.

JUDGE LEWIS: All right. But what do I do if there's a clear problem with the regulation and the statute, that it's clear that the statute says A and the reg says B?

MR. TARNOW: I think --

JUDGE LEWIS: Am I not bound almost if you will be high authority to say that the statute has greater significance than the regulation?

MR. TARNOW: What I would do in your position, Your Honor -- and I don't envy your position -- would be to state that in a ruling upholding the application of the regulation in this instance but stating very clearly your concerns that the regulation is inconsistent with the statute and leave that as a matter for appeal to the secretary or as you suggested federal court litigation as opposed to APA litigation.

I -- the precedent -- and it's not just within the Department of Education but it's a general Administrative Procedure Act issue of an ALJ setting aside a regulation. The precedent is fairly long standing, and --

JUDGE LEWIS: It is.

MR. TARNOW: -- and as tempting as this case may be to ignore that precedent, given the circumstances -- I think a way can be found to apply the regulation as we did and to uphold the application of the regulation and to note for the secretary or anyone else who may have the authority to

change the regulation or to set it aside that you have serious concerns about -- or that you expressly find the regulation to be in conflict with the statute.

But I do not think this is the time to overturn that precedent. It will set a precedent not only for the department but other lawyers like myself who do general administrative law will see that decision and I think the effects could be -- are unforeseeable, even though there's a long precedent the other way.

JUDGE LEWIS: You spoke of this long-established the other way. Do you have any particular cases that you know about?

MR. TARNOW: I couldn't name them off the top of my head, Your Honor, and I apologize for that, but I can certainly cite numerous cases from both the Department of Education and other departments in a supplemental brief.

JUDGE LEWIS: I would appreciate if you would do that in your supplemental brief.

MR. TARNOW: I certainly will.

Is Your Honor at all -- I believe we've exhausted the heart of the dispute on the percentile calculation. I could walk through the specific numbers that were used in applying the appendix, but I know that is in our briefs and in the interest of efficiency we can not address that right now if you would care to avoid the --

JUDGE LEWIS: I don't have any real questions in terms of the other issues other than the teacher index that we went over and the one clarification on the cite.

MR. TARNOW: I will leave the other issues for the briefs, Your Honor, and summarize that the impact aid program recognizes that in states attempting to equalize their educational funding for all students in the state that with impact aid some school districts might receive a windfall, frustrating the state's efforts at equalization.

The presence of impact aid funding which did frustrate the state's equalization efforts was recognized in the mid 1970s when this exception was carved out, and for that reason a Section 8009 was enacted.

In this case, New Mexico demonstrated, as I've stated, that using the disparity calculation promulgated in the regulation and the appendix to the regulation which we see that they must be read together as a -- in unity as a single enactment -- promulgation of the secretary, that new demonstrated it properly applied that regulatory requirement that it satisfied the criteria to be deemed equalized under Section 8009, and therefore the assistant secretary certification should be sustained.

JUDGE LEWIS: My only point to you would be that as I read the regulations, the body of the regulation in effect parrots what the statute says, and it's only when you get to the appendix that it becomes apparent in there that the level of comparison is based upon student membership, if you will.

MR. TARNOW: I would not disagree with -- that appears to be the case, but nonetheless, the appendix is part of the regulation and was promulgated together with the body of the regulation through notice and common rulemaking, and therefore the application of that appendix is as valid as the application of any other interpretation that may come out of the text of the reg.

And the department's expressed statement that the methodology to be employed is in the appendix is something -- and that's in the body of the regulation --

JUDGE LEWIS: Cooperation by reference.

MR. TARNOW: Exactly, Your Honor.

JUDGE LEWIS: Okay.

MR. TARNOW: Thank you.

JUDGE LEWIS: Mr. VanAmberg, do you have anything else you want to add on this?

MR. VanAMBERG: Just briefly, Your Honor. I would -- addressing Mr. Tarnow's arguments, I would suggest to the Court that the idea that you rank the districts according to size essentially and then I'm not sure what you do after that. I guess then you eliminate the top 5 percent and the bottom -- and the lower 5 percent, and then I guess you would then compare per student expenditures from the top and the bottom.

The ranking has nothing at all to do with the comparative wealth of the districts, and that is the whole purpose of the statute as I see it, is to see if there is a disparity. It would just be -- you could very easily end up with identically funded districts at the top and at the bottom I think under his proposal.

The comment that if the methods suggested by Zuni were employed in determining whether equalization exists would result in no state qualifying I think means that there's a crisis out there. You've got supposedly equalized funding among

districts. As we've discussed you take out financial influences which reflect idiosyncratic problems with a district's special ed size density, so you make the funding more or less equal and you have equal students in the body.

You then allow for 5 percent discount of the 25 percent disparity and no one will -- no state in this country will have equalized educational opportunities according to that formula. I think that's unfortunate, but I don't think that that problem should drive what the formula is. I think that's another problem that reveals.

Mr. Smith stated that there is a -- that the purpose of the formula as set out in the appendix is to account for -- try to even out disparities which are based again upon these idiosyncratic elements which are found in the districts, and I would submit that those elements are reduced through the deductions that are made through the state, which they are allowed to make anyhow for the funding.

Concerning the utility of this formula, if you were to have let's say Albuquerque up at the top and Las Cruces down at the bottom and you were to use the state's method where you reduce students, you end up in absolutely no elimination of any LEAs from the formula, but if by happenstance you have small districts at the top and small districts at the bottom you end up with a widely different result.

I think the most important --

JUDGE LEWIS: I think in part what he's saying is that from a statistical viewpoint if you utilize students or membership as opposed to LEAs you end up with a better comparison, and that's because you have substantially greater number of students than you do LEAs.

MR. VanAMBERG: But the problem is then -- is that Congress talks to equalized funding among LEAs and so you're eliminating the students, and this could end up, as is happening in New Mexico, eliminating a number of LEAs, 28 percent of them.

JUDGE LEWIS: Right. But that may be because they occupy a substantially small part of the population of LEAs.

MR. VanAMBERG: They do, but Congress does not say we're more concerned with an LEA which has a large population than we are with LEAs that have a small population. Each LEA has its own rights and is considered equal under the statute. And so when you start eliminating them to the point that you're -- that the true disparity is masked, I don't think that's the appropriate way to do it.

I would like to address an issue that Your Honor touched upon and I think is very important, and that is the fact that the regulation itself -- there are two parts to it. One is that the regulation states, specifically 34 CFR, 222.162, in determining the disparity percentage, the secretary shall disregard LEAs and per pupil expenditures or revenues above the 95 percentile or below the fifth percentile of those expenditures of revenues in the state."

That's the statute. So you've got a situation where there's not -- there is a conflict it is true between the appendix and the statute, but there is also a conflict between the appendix and the actual body of the regulation itself. I don't think that Your Honor would have to invalidate the regulation more than it would have to resolve an inconsistency within the regulation itself.

And I am suggesting, Your Honor, that the body of the regulation which is supposed to -- which mirrors the statute -- the fact that it does mirror the statute certainly defines the intent of that regulation, which is to comport with the statute, and the only way to resolve the difference between the appendix which conflicts with the main body of the regulation would be basically to ignore the appendix and follow the body of the regulation itself.

That's all I have, Your Honor.

JUDGE LEWIS: That's an interesting point, counsel, and I want you to address that in your brief. Essentially what he said is that I'm really faced with resolving an inconsistency between what's in the regs and the appendix, and therefore I have to choose one or the other. Interesting.

Nothing further, Mr. Smith?

MR. SMITH: No, sir.

JUDGE LEWIS: Mr. Tarnow?

MR. TARNOW: No.

JUDGE LEWIS: Okay.

It's your turn.

MR. KOZELISKI: If it please the Court an opposing counsel, Your Honor, I'd like to -- I won't introduce all the members but we do have board members here from both the Zuni School District and the Gallup School District, both of our superintendents, and some of the support personnel for the district.

JUDGE LEWIS: Thank you all for coming. I appreciate it.

MR. KOZELISKI: Your Honor, what I'm here to argue is if Mr. VanAmberg does not win his argument on equal -- being equalized, which I believe he will, then we turn to what proportional share of the 874 funds if the state is in fact equalized can be kept by the state, and it's my understanding of the state's position is that we've been doing it for all these years and no one's objected, and so we must be doing it right, or that it is beyond the review of this tribunal.

We don't agree. We believe that Your Honor can rule on it and send it up the chain.

In the joint stipulation 6, which was also quoted in page 6 of the state's first brief, is the proportionality language which says, "Upon certification by the department as being, quote equalized, the state may take impact aid payments into consideration only in proportion to the share that local tax revenues covered under the state equalization program are of total local tax revenues."

And what I would like to touch on first is what the state and the districts agree to -- our Gallup does, and I'm sure Zuni's in agreement.

The state took 95 percent of all 874 funds up until July 18, 1999. Since that time the state now takes 75 percent. The Gallup School District is made up of 83 percent non-assessable federal land and 17 percent private land. For the year 1998 the private land in Gallup is 17 percent generated $245,774 in support of state schools, and statewide the property tax generated was $7,699,000.

Now, the state -- we believe that the state's picking of numbers such as 95 percent and 75 percent are completely arbitrary, and we believe that they dropped it from 95 percent to 75 percent because Zuni, joined by Gallup and another district, Grant-Cibola, filed litigation in state court over funding. And at the next legislative session it was reduced from 95 percent to 75 percent.

And the reason I believe that it's finally come to pass is the districts move slowly. They tried to work through the state department of education and that didn't work. Then they went to the political leaders and that -- both here and in Washington and that didn't work, and finally they've resorted to the courts. We have a civil case pending out in Gallup in the Eleventh Judicial District, a state court, and we've taken this appeal.

And it all stems -- all these actions stem from the equalization formula. Prior to equalization Gallup-McKinley County, which at that time include Zuni, was one of the top districts in the state as far as pay scales and income, and there's no doubt that the state wanted to get their hands on Gallup's money.

And the state -- I believe it's in Attachment 5 to their original brief has the entire testimony of a Harry Wugalter. He was the head of the state school public finance, and they rely on his testimony as Congress having the knowledge that -- what New Mexico was doing. And his report to the governor and to the legislature in 1974 -- I'd like to just read three sentences out of it. It's out of the forward. It's the same gentleman.

"The 1974-75 school year was most interesting for New Mexico. This report reflects the first complete year of the

effect of the new school financing funding formula which continues to be acknowledged by the many organizations that have learned of it as one of the finest equalization plans in operation in the United States."

The second paragraph of his forward states this. "The second phase in New Mexico's equalization efforts involves capital outlay, and we intend to present to the 1976 state legislature a plan which will provide equity in this critical area of school support."

Now, I am sure that he presented that to the state legislature. The problem is the state legislature still hasn't acted on it. And the money which the state has taken which is basically a substitute for property tax for the lack of private land in McKinley County they're using for operational purposes. And our original argument was that the brief -- when we briefed it at the start, 65 percent of funding for state schools came from state property tax and 35 percent came from PL 874 funds.

And this chart here, which I would just like to show the Court, is -- in 1981 before what we called the big max tax cut, in which the state basically gutted the property tax in support of public schools, property tax was 10 percent and impact aid was 4 percent. The rest of it was from sales tax and other sources. To us that isn't an issue here. Gallup and McKinley County and Zuni have -- they pay a lot of those type of taxes because there's tourist industry and the Native American art that's sold out there, so I doubt that the state will bring that up.

But we're really dealing with these two little pieces of the pie, a 4 percent and a 10 percent. In '82-83 property tax was at 1 percent and the state -- or impact aid stayed at 4 percent.

After the state reduced it down to less than a percent -- it's really at 50 cents per $1,000 of the valuation -- it doesn't even show up as a percentage.

But at the same time, the state has kept -- it was 95 percent and it's now 75 percent, and I believe that our first analysis -- and probably a side for the Court which I would like to bring out is the two superintendents of our districts filed a one-page appeal on these issues. After that, Mr. VanAmberg and I became involved. And at about the time that the joint stipulation was filed with Your Honor was the first time that either Zuni, Gallup, or any other school district actually saw how the state did their calculations, and really until this day people are still looking at it, going, Oh, look at this.

And so I would ask the Court to forgive how we've -- I think Mr. VanAmberg said we've kind of changed as we've grown through this process, but we really didn't get to see any of the numbers until May of this year. Up until then there was a two or three-page submission, and people are analyzing it and so my theory -- I don't want to say has changed since the first because I think the proportionality at the time that equalization started is valid, but the state had a problem with it in their -- I don't call it reply brief, but with their brief in chief or their brief of their motion for summary judgment.

And we came back and said, Fine. If that's your position then we'll just take a percentage. If private land of 17 percent of our district generates $245,000, what I did was solve for X. If that's it then what should the state get from the 83 percent of federal non-assessable land? And I believe that's on page 4 of our reply brief, and I indicated that it would generate basically $1.2 million.

Today in reading the regulations and everything for about the seventh or eighth time, I don't want to say I've come up with another one, but I think it's another option that Your Honor has, in that the private land in McKinley County for our school district generates the 245,774. Statewide tax -- property tax generates $7,699,000.

So under the proportional share of the local tax revenues to the total local tax revenues for the state, what I did was divide Gallup's -- McKinley County's portion by the statewide portion. You divide 245,000 by 7,600,000, and Gallup's share of the state's whole is 3.19 percent. So the state should be able to take no more than 3.19 percent of the PL 874 funds designated for Gallup-McKinley County schools, which would be in the area of $675,000.

Basically what it is is the property taxpayers in McKinley County are supporting state education to the tune of 245,000. Okay. What is the federal government's responsibility for their portion of the land in McKinley County, and that would be $674,000 for the year 1998. So it is a proportionality issue.

I think the Court has the choice of going back to when equalization started, or they can take it based upon federal land versus private land in the county, or they can do it based upon the -- which is a kind of more strict interpretation of the regulation that what the local tax revenues are to the total local tax revenues for the state -- now, the State of New Mexico controls how much they can take. They can up it, they can up the tax rate, or they can take it down.

Now, for whatever reason federally PL 874 funds have grown from about 19 million up to $56 million statewide. At the same time the state has seen fit to reduce the property tax

support for education from -- at one point it was over $11, or $11.25 per $1,000 of valuation down to 50 cents. It's their choice.

Now, all the other sources of revenue -- Gallup and Zuni are part of that. We're paying sales tax. We're paying all the taxes that everybody else -- as a matter of fact, I'm sure the state won't argue it because our share is quite high for the state average.

And what the state seems to forget is -- let's say there's District A that has no federal land. At one point they were paying $11.25 per $1,000 of valuation into the state coffers to support schools, and the 17 percent of us out in Gallup that owned land were doing the same thing.

Now, Gallup -- 83 percent which is non-assessable federal land, up until a year and a half ago the state was taking 95 percent instead of really should be 50 cents on a thousand dollar valuation. But they're taking our base for what we could use to support our local school districts. It's freed it up for all the school districts that don't have federal land.

But the state has continued to take the lion's share of our district's money for operational support statewide.

JUDGE LEWIS: But isn't that the way that the statute works when you try to equalize? If you're in a state that doesn't equalize then the federal money given to the local school district -- the impact aid is their's, period?

MR. KOZELISKI: Right.

JUDGE LEWIS: Okay. Then states tried to equalize, and the problem they had when they tried to equalize was

they had all this federal money coming in to different school districts. Some districts got it and some districts didn't, and therefore the states essentially ran into a roadblock. They could not equalize because of the major impact of the federal aid.

So they went to Congress, and then Congress came through with this idea of creating an equalization program, and initially they provided three different measures of tests: wealth neutrality, disparity, and a third one. And moving on, at this point the only test remains is the disparity test, but the idea is to take the federal money and in effect throw it in as part of the pot of money that's then distributed to the different school districts so that everybody ends up with essentially the same part of the pie.

MR. KOZELISKI: Your Honor, I agree, but what the state has done is they are not using -- we can go back to '74 when it started or we can use it now -- the amounts now that they're not throwing it all into the pot.

JUDGE LEWIS: They've taken part out of the pot.

MR. KOZELISKI: Right. But what I'm saying is we're talking about -- the state at one point decided that when it started this was the share of property tax, and the state decided that they didn't want to use property tax base.

So what we're arguing is they can take the same proportional share that they take from property tax because the -- as so well stated in their brief on their final page of the final attachment it states that the original concept of impact aid was simple: reimburse school districts for either the loss of real property, which is our case, or federal activity.

So what they're doing -- a school district that has no federal property -- this is a bonanza to them because they actually get some of our money, but they're not sending us any of their property tax, and districts with high levels of federal land -- Zuni is probably at 98 percent and we're at 83 percent.

The state -- it wasn't a bad deal to start with until they decided to gut the property taxes as support for schools, and what we're saying is if you don't want to use it for support of schools then fine, we get to keep it. And I think under the regulation where it says only in proportional share of that local tax revenues, which would be the 17 percent or to the total of the tax revenues.

The state has control of how much they want to use. They just don't want to use this money, but the property tax substitute for the federal lands -- they're going to keep that, but all the districts with private lands don't have to kick anything more in than we do from the standpoint of sales tax and the other sources of revenue.

So our argument is, Your Honor, that the state can't take any more than the proportional share that the private property owners in McKinley County pay into the state. I guess my question to the state is, I believe it's on -- well, part of the joint stipulation on page 6, paragraph 14, local revenues as defined by state statute is 75 percent of the LEA's receipts of school district property tax prior to 1999. It was defined as 95 percent.

Did they come up with that? They just picked numbers out of the air? I know why they lowered it, because we sued them in state court. But our proposition is this is the formula. If they want federal money they have got to go -- if they want

the 874 funds they have to use the formula of local tax revenues to total local tax revenues.

They just can't -- the legislature can't say, Okay now, this year it's going to be 69 percent. The state legislature of the state -- no one's ever called them on it so they've done whatever they wanted to do up until this point, but they cannot take federal money without following the regulations set out in the statute. The state's just making up these numbers: 75 percent, 95 percent.

We believe that this formula should be followed, and whether the Court wants to go back to the inception or use one of the formulas of private land versus federal non-assessable land or the actual revenues generated by that district.

JUDGE LEWIS: I -- at this point I don't see how I can go back to the inception of the plan.

MR. KOZELISKI: I agree, Your Honor.

JUDGE LEWIS: I've got to fit something in under the regulations, so now you've got to show me something that I can wedge into those regulations.

MR. KOZELISKI: Well, Your Honor, that --

JUDGE LEWIS: Okay. And in terms of the proportion at the inception of the plan, the problem with that is that the proportion analysis is made on an annual basis.

MR. KOZELISKI: I agree, Your Honor, and the one I just told you earlier -- I said you could go back to that and I realize the problems and our view has changed the more we

learn, but basically what I'm arguing to the Court today is that what private property generates in McKinley County for state school support is to the statewide support, that's the same percentage the state can keep of the PL 874 funds, and that is 3.19 percent.

JUDGE LEWIS: Okay. So if I understand what you're saying, you're saying the amount of state revenue generated by the property tax that's covered under the state plan is to the total amount of statewide tax generated?

MR. KOZELISKI: No. Property tax generated.

JUDGE LEWIS: Statewide property tax generated?

MR. KOZELISKI: We're dealing with --

JUDGE LEWIS: Okay. As opposed to the state property tax generated by Gallup?

MR. KOZELISKI: Right. We generate property tax out there to support the local hospital, and the small college.

JUDGE LEWIS: Right.

MR. KOZELISKI: What we're arguing is that based upon the regulation what Gallup-McKinley school district's private property owners generate to the state property tax generated as a whole for support of public schools, that's the same percentage that the state can keep of the PL 874 funds.

That's all I have Your Honor, if you have any questions.

JUDGE LEWIS: Okay. No, I don't.

Mr. VanAmberg, would you like to add anything?

MR. VanAMBERG: I have nothing to add, Your Honor.

JUDGE LEWIS: Okay.

Mr. Smith?

MR. SMITH: In its brief, although I didn't mention it here today, Gallup-McKinley criticized the state for allegedly using impact aid funds to supplant local tax revenues, but they don't cite any statutory provision in support of the supplanting argument. Zuni for its part doesn't make an argument in its brief that there's been supplanting, but its superintendent's affidavit accompanying its brief argues that 20 USC 6322 applies, but this is a provision that applies strictly to Title 1. It doesn't have any applicability here.

In fact, there is no statute that makes it a supplanting violation with respect to impact aid for an equalized state to reduce reliance on tax revenue. And moreover, tax revenues are usually a prime source of inequity in many cases.

The reason I'm going into all this is because the argument that they make here about the proportion are really just sort of a guise for making the supplanting argument that they really would like to make, but number one, there's no statute to support it. Number two, the facts don't support it.

If you look at Attachment 2 to the four affidavit accompanying the state's brief you'll see that the trend has been in New Mexico that as reliance on local taxes has declined the state has increased its share of operational

expenses for education, also under the funding formula 100 percent of program costs are guaranteed, so that argument really doesn't carry a whole lot of weight.

The argument that the ceiling on permissible offsets should be limited according to the amount of local tax revenues that the district raises is not even a proportional argument, so it's clearly not consistent with the statute. There's no proportion there. They're saying, We raised $245,000 in local tax revenues, therefore that ought to be the ceiling on the impact aid offset, but there's no basis for that in the statute.

The second argument that we go back to the percentage share back in 1976-77 when the equalization program went into effect also is without merit. There -- although it's a proportion it's not consistent with the statutory portion. As you observed, Judge Lewis, there's nothing in the statute that establishes a year the funding formula was established. It's the baseline for purposes of the proportion.

And as the state's pointed out in its brief, the purpose of the proportion is to increase or encourage states to cover more of the local revenues in their funding formula to equalize more local revenues in order that states would become more equalized. That's what the proportion is attempting to do here. The 75 percent and the 95 percent that we heard mentioned here this morning represent the amounts of local revenues that the state has concluded that it can cover under its funding formula, that it can provide equalization funds to match.

And it is each LEA's proportion of local tax revenues to its total local tax revenues that is the statutory proportion that is to be applied here, and that's simply not what Gallup-

McKinley is arguing here. They have their own extra-statutory standards that they would like to apply here.

You've heard a lot of policy arguments made this morning. There may be policy arguments that can be made for some of these standards or other ones, but I would submit that it would not have been appropriate for the assistant secretary to consider them and likewise it would not be appropriate for this tribunal to consider them.

That concludes my argument.

JUDGE LEWIS: What about the last option that was just raised where the proportion is based upon property taxes raised in Gallup over total state property taxes? What's the matter with that proportion in terms of using it under the regulation?

MR. SMITH: I don't believe that's consistent with the language of the statute. Local revenues covered means those revenues that the state equalizes of total, and then the denominator is total local revenues. I don't believe that approach is consistent with that.

JUDGE LEWIS: Is that approach inconsistent with either the definitions of local tax revenues or total local tax revenues?

MR. SMITH: I don't believe with the definitions, but with the regulation that tells you how to apply them I think it is.

JUDGE LEWIS: Do you mean the examples? Is that it?

MR. SMITH: First of all, it's not made on a case by case basis. I'm speaking about --

JUDGE LEWIS: Well, they would say it's made on a case by case basis because you would determine a different percentage for each LEA, so I think they would say it's a case by case basis. So I don't think that's a problem. At least I don't see it.

The question is one of whether it's consistent or inconsistent with the regulations, and if memory serves me right I think there is an example in the regulations which essentially utilizes the local tax revenues as being those revenues attributable to a single LEA. In other words, you compute a percentage for one LEA and then you compute another percentage for another LEA, and it may be different because the percentage -- because the local total tax revenues may vary.

MR. SMITH: Correct.

JUDGE LEWIS: Do you have the definition of total local tax revenues?

MR. SMITH: Yes. (Perusing documents.) Total local tax revenues means all local tax revenues as defined in paragraph C including tax revenues for education programs for children needing special services, vocational education, transportation, and the like during the period in question, but excluding all revenues from state and federal sources.

JUDGE LEWIS: What does C say?

MR. SMITH: C -- it says a revenue is a revenue for current expenditures and in turn current expenditures mean total charges incurred for the benefit of the school year in elementary or secondary school program. It does not include expenditures for capital outlay, debt service for capital outlay,

expenditures for state -- from state sources for special cost differentials, expenditures of revenues from local or intermediate sources that are designated for special cost differentials, expenditures of funds received by the agency --

JUDGE LEWIS: So basically it's current operating --

MR. SMITH: Yes, essentially.

JUDGE LEWIS: -- expenditures?

To each of you, you might add in your list of an issue to address the last option that was raised by Gallup as to whether that falls within or outside the regulations. Since that was just raised at this point I'll give you all a chance to provide your views.

And for Gallup, if you would like to expand on that, go ahead. Okay? Because the name of the game here is to try to come up with the correct answer to all things.

Do you have anything else, Mr. Smith?

MR. SMITH: I have nothing further. A question -- would it be possible for us to have a copy of the transcript of this hearing in preparing these additional remarks?

JUDGE LEWIS: Yes.

MR. SMITH: I'd find that very helpful.

JUDGE LEWIS: Yes.

Let's go off the record for a second.

(Discussion was held off the record.)

JUDGE LEWIS: Let's go back on the record.

Mr. Smith, anything else?

MR. SMITH: I have nothing further.

JUDGE LEWIS: Okay. New Mexico.

MR. TARNOW: Your Honor, once again, the state would endorse and incorporate the comments of the department on this because we do feel that the department has stated the case to a large extent.

One thing that I believe needs some clarification -- and the superintendent can speak to the philosophy of the New Mexico funding program -- but Gallup's focus on property tax I think is misplaced, particularly since the regulations do allow for the consideration of other taxes, and that's particularly important in New Mexico where school support comes from a variety of sources, including general fund as appropriated by the state legislature, which includes general and gross receipts tax, income taxes, interest earnings within jurisdictions, severance taxes, license fees, and other receipts.

And so therefore particularly on the last option raised by Gallup to use a percentage of property tax only really ignores the fundamental philosophy and purpose and structure of the New Mexico public school finance stature.

JUDGE LEWIS: Right. But the problem here is we're trying to fit New Mexico into a federal statute, and the federal statute's drafted with the idea that there'll be other states and every state has its right to do however it wants to operate.

But if you want the federal funds you've got to be consistent with what the federales want.

My question to you is when you get to the proportion we are concerned with the proportion with essentially the state property taxes and only the state property taxes. Is that correct?

MR. TARNOW: I would not say that's correct, Your Honor. Local tax revenues includes under the definitions and the regulations far more than property taxes. And in fact --

JUDGE LEWIS: Well, but in terms of here, in terms of how New Mexico did its proportion computation included in those figures, is there anything other than state property taxes?

MR. TARNOW: If I might defer to the expert on that --

JUDGE LEWIS: Sure.

MR. TARNOW: -- Brenda?

MS. GILES: [Inaudible].

JUDGE LEWIS: I mean, it is my understanding, based on the state law that New Mexico has essentially said that 75 percent of the state property taxes shall be covered under the equalization plan.

MS. GILES: Yes, Your Honor. That's correct.

JUDGE LEWIS: And so then there are no taxes other than state property taxes in that amount?

MS. GILES: That's correct.

JUDGE LEWIS: Okay. Thank you. And in terms of the total local tax revenues that consists of solely state property tax revenues?

MS. GILES: Well, we considered the local property tax rate as what's generated by each LEA with the assessed valuation that is within that district.

JUDGE LEWIS: Okay. But there aren't any sales taxes in there?

MS. GILES: No.

JUDGE LEWIS: Or anything else?

MS. GILES: All the sales taxes would be incorporated in the state revenue that comes into the school district, because they're collected at the state level.

JUDGE LEWIS: Okay. Through some other form?

MS. GILES: It's through the state equalization guarantee, which is funded with appropriation from the general fund, so all those other local tax -- those other type of taxes, sales taxes, income taxes, are part of the general -- state general fund.

JUDGE LEWIS: Okay. Thank you.

MR. TARNOW: That's my point, Your Honor. I'm raising that as while that proportionality does speak directly to the property tax there is -- and I agree that we're trying to fit New Mexico into a federal scheme -- I think that last

option would frustrate the equalization efforts as much as decertification asked for by Zuni.

And I think while it's instructive and helpful to look at the history of the 95 percent and 75 percent, so long as that falls within and can be made to fit in to the federal proportionality test, whether it's 95 or 75 or any other number which Gallup claims is arbitrary I would submit that so long as it does not violate the federal statute that's a matter of state policy.

JUDGE LEWIS: I would tend to agree on that. They could take 100 percent if they wanted to. It's just a matter of what the proportion is.

MR. TARNOW: Exactly.

JUDGE LEWIS: But my question to you is for purposes of the proportion they're using as the numerator, the state property tax is generated for a particular LEA if you will, and then as the denominator they're using the total state property taxes. So you've got 75 percent, so they're saying that if it happened to be $75,000 and 100,000, and the 100,000 was the amount of state property taxes that was generated, they would say that they would take that as the total state taxes for the denominator, but for the numerator they would use the LEA's total taxes -- total property taxes.

Do you have a problem with that?

MR. TARNOW: The state does have a problem with that, Your Honor, but --

JUDGE LEWIS: Okay.

MR. TARNOW: -- but not having heard that argument until today I think we would require a supplemental brief to really examine it.

JUDGE LEWIS: Okay.

MR. TARNOW: It does not certainly fit into the state scheme, and I think we will find upon parcing it out that it doesn't fit into the proportionality test either. And --

JUDGE LEWIS: But the states are supposed to design their scheme to fit within the federal scheme, not the other way around.

MR. TARNOW: Well, and I believe it has. It's just the matter of the way New Mexico equalizes creates some unique situation -- unique circumstance which -- a philosophy under the state equalization guarantee causes one to maybe have to apply the proportion on a way that doesn't violate it but perhaps isn't as cut and dry as the districts might otherwise submit.

JUDGE LEWIS: My question is I have to look at this and look at the regulation and see how the different arguments fit within the regulation.

MR. TARNOW: I understand that, Your Honor, and I think -- I know we'll be able to make a case that this argument -- that argument proposed by Gallup today does not have merit in the regulation. Federal law, state law -- federal law, federal regulation, or the state law, and the state law is consistent.

And as to the other matters of -- as I stated, we would defer to Mr. Smith and the department on the other

interpretations raised by Gallup in its other briefs. We similarly find they have no basis in the statute or regulation.

JUDGE LEWIS: Thank you.

Okay. Any rebuttal?

MR. KOZELISKI: Just a few words, Your Honor.

I guess as a personal note when you were talking about the scheme and fitting it into the federal scheme, I was thinking that maybe this is all just a big scheme to keep my client's money, and the reason I say that is when Mr. Gomez called me the first time to help him out on this he told me about it and I said, No, they don't do that to you, and it took about three meetings for him to convince me that this was going on and that it wasn't fair.

But our district is penalized severely, and I think it's our point that we have to be treated the same as a district that has no federal land, and we're not. Clearly --

JUDGE LEWIS: But the statute says that you're not. That's inherent in there. It's inherent in the exception --

MR. KOZELISKI: That's right.

JUDGE LEWIS: -- that you're not going to be treated the same in the sense that you may get federal monies and then lose some of those federal monies.

MR. KOZELISKI: We don't mind losing some of them, Your Honor. We mind losing a giant portion of it --

JUDGE LEWIS: But the answer to part of that question may lie within the state.

MR. KOZELISKI: Yes, Your Honor. Well, we have other litigation going.

In reference to the determination with -- Mr. Smith said the regulation at 222.163 -- it says, Determinations of proportionality must be made on a case by case basis for each LEA affected and not on the basis of a general rule to be applied throughout the state. So it is by a LEA -- for each LEA case by case.

JUDGE LEWIS: Okay.

MR. KOZELISKI: Thank you, Your Honor.

JUDGE LEWIS: Mr. Smith?

MR. SMITH: I have nothing further.

JUDGE LEWIS: Mr. Tarnow?

MR. TARNOW: Nothing, Your Honor.

JUDGE LEWIS: Anybody else have anything else to say?

(No response.)

JUDGE LEWIS: Okay. At this point then the parties will submit additional briefs on or before December 4. We will try to get the transcripts out to you as soon as we receive them. If there's nothing further then we will adjourn for the day.

Thank you, all.

(Whereupon, at 12 o'clock noon, the hearing in the above-entitled matter was concluded.)

CERTIFICATE

CASE NAME:	Zuni Public School District #89, et al.
DOCKET NUMBER:	99-81-1
LOCATION:	Albuquerque, New Mexico
DATE:	October 4, 2000

I do hereby certify that the foregoing pages, numbers 1 through 95, inclusive, are the true, accurate, and complete transcript prepared from the verbal recording made by electronic recording by Joe Gillis before the U.S. Department of Education Office of Hearings and Appeals.

10/14/2000

(Transcriber) (Date)

EXHIBIT A
JUDGE O'BRIEN'S DISSENT

Impact Aid Disparity for 1999-2000

	District	Revenue/ Member
1	Mosquero	$6,520.00
2	Corona	$5,791.00
3	Los Alamos	$5,611.00
4	Vaughn	$4,641.00
5	Hondo Valley	$3,690.00
	1st district ABOVE 95th Percentile $3,650.40 = 95th Percentile	
6	Maxwell	$3,591.00
7	Mora	$3,530.00
8	Roy	$3,516.00
9	Logan	$3,484.00
10	Cuba	$3,404.00
11	Silver City	$3,391.00
12	Texico	$3,335.00
13	Zuni	$3,320.00
14	Springer	$3,295.00
15	Jemez Valley	$3,286.00
16	Ruidoso	$3,278.00
17	Tatum	$3,266.00
18	Penasco	$3,259.00
19	Raton	$3,249.00
20	Tularosa	$3,246.00
21	Bernalillo	$3,244.00
22	Las Vegas West	$3,241.00
23	Mesa Vista	$3,233.00
24	Hatch	$3,206.00
25	Loving	$3,204.00
26	Mountainair	$3,195.00

	District	Revenue/ Member
27	Cobre	$3,194.00
28	Melrose	$3,187.00
29	Taos	$3,164.00
30	Pojoaque	$3,155.00
31	Wagon Mound	$3,154.00
32	Carlsbad	$3,152.00
33	Clayton	$3,151.00
34	Espanola	$3,147.00
35	Jemez Mountain	$3,123.00
36	Las Vegas City	$3,122.00
37	Ft. Sumner	$3,100.00
38	Magdalena	$3,092.00
39	Jal	$3,091.00
40	Cimarron	$3,088.00
41	Reserve	$3,087.00
42	Lordsburg	$3,074.00
43	Albuquerque	$3,071.00
44	Chama	$3,065.00
45	San Jon	$3,059.00
46	Questa	$3,054.00
47	Santa Fe	$3,050.00
48	Grants	$3,035.00
49	Pecos	$3,033.00
50	Central	$3,027.00
51	Santa Rosa	$3,011.00
52	Elida	$3,006.00
53	Estancia	$3,002.00
54	Dora	$2,996.00
55	Roswell	$2,992.00
56	Clovis	$2,983.00
57	Alamogordo	$2,982.00
58	Tucumcari	$2,975.00
59	Animas	$2,975.00

	District	Revenue/ Member
60	Portales	$2,975.00
61	Las Cruces	$2,974.00
62	Socorro	$2,968.00
63	Bloomfield	$2,968.00
64	Artesia	$2,964.00
65	Lovington	$2,963.00
66	Capitan	$2,962.00
67	Rio Rancho	$2,959.00
68	Belen	$2,948.00
69	Farmington	$2,948.00
70	Truth or Cons.	$2,945.00
71	Aztec	$2,942.00
72	House	$2,936.00
73	Grady	$2,915.00
74	Deming	$2,912.00
75	Los Lunas	$2,887.00
76	Cloudcroft	$2,884.00
77	Dexter	$2,883.00
78	Carrizozo	$2,880.00
79	Moriarty	$2,870.00
80	Gallup	$2,861.00
81	Quemado	$2,858.00
82	Eunice	$2,849.00
83	Hobbs	$2,848.00
84	Gadsden	$2,829.99
	$2,803.80 = 5th Percentile 1st district below 5th Percentile	
85	Lake Arturn	$2,787.00
86	Dulce	$2,783.00
87	Hagerman	$2,777.00
88	Floyd	$2,725.00
89	Des Moines	$2,672.00

District	Revenue/ Member
Total	$284,095.00
Mean	$3,192.08
Median	$3,059.00
95th Percentile	$3,650.40
5th Percentile	$2,803.80

NEW MEXICO STATE
DEPARTMENT OF EDUCATION

IMPACT AID DISPARITY FOR 1999-2000
Based on Actual Revenue for 1997-1998

DIST	REV/ MEM.	TOTAL MEM.	CUM MEM.	REV/MEM AT 95/5%
Mosquero	$6,520	57.00	57.0	
Corona	$5,791	81.00	138.0	
Los Alamos	$5,611	3509.50	3647.5	
Vaughn	$4,641	111.50	3759.0	
Hondo Valley	$3,690	157.50	3916.5	
Maxwell	$3,591	152.00	4068.5	
Mora	$3,530	707.50	4776.0	
Roy	$3,516	113.00	4889.0	
Logan	$3,484	278.00	5167.0	
Cuba	$3,404	773.00	5940.0	
Silver City	$3,391	3837.50	9777.5	
Texico	$3,335	498.00	10275.5	
Zuni	$3,320	1696.00	11971.5	
Springer	$3,295	285.50	12257.0	
Jemez Valley	$3,286	513.50	12770.5	
Ruidoso	$3,278	2408.00	15178.5	
Tatum	$3,266	369.00	15547.5	
Penasco	$3,259	709.50	16257.0	$3,259
Raton	$3,249	1479.50		
Tularosa	$3,246	1140.50		
Bernalillo	$3,244	3528.50		
Las Vegas West	$3,241	2130.50		
Mesa Vista	$3,233	572.00		
Hatch	$3,206	1410.50		
Loving	$3,204	556.50		

JA 90

DIST	REV/ MEM.	TOTAL MEM.	CUM MEM.	REV/MEM AT 95/5%
Mountainair	$3,195	365.00		
Cobre	$3,194	2067.00		
Melrose	$3,187	287.50		
Taos	$3,164	3326.50		
Pojoaque	$3,155	1937.50		
Wagon Mound	$3,154	185.50		
Carlsbad	$3,152	6690.00		
Clayton	$3,151	732.50		
Espanola	$3,147	4920.50		
Jemez Mountain	$3,123	415.50		
Las Vegas City	$3,122	2623.50		
Ft. Sumner	$3,100	428.00		
Magdalena	$3,092	377.50		
Jal	$3,091	534.00		
Cimarron	$3,088	666.50		
Reserve	$3,087	270.00		
Lordsburg	$3,074	860.50		
Albuquerque	$3,071	83709.50		
Chama	$3,065	620.00		
San Jon	$3,059	217.50		
Questa	$3,054	638.50		
Santa Fe	$30,501	13044.00		
Grants	$3,035	3699.00		
Pecos	$3,033	878.50		
Central	$3,027	1314.00		
Santa Rosa	$3,011	860.00		
Elida	$3,006	127.00		
Estancia	$3,002	950.00		
Dora	$2,996	254.00		

DIST	REV/ MEM.	TOTAL MEM.	CUM MEM.	REV/MEM AT 95/5%
Roswell	$2,992	10528.50		
Clovis	$2,983	8639.50		
Alamogordo	$2,982	7824.50		
Tucumcari	$2,975	1526.50		
Animas	$2,975	580.50		
Portales	$2,975	2806.50		
Las Cruces	$2,974	21365.50		
Socorro	$2,968	2204.50		
Bloomfield	$2,968	3358.50		
Artesia	$2,964	3861.00		
Lovington	$2,963	2909.00		
Capitan	$2,962	622.50		
Rio Rancho	$2,959	8590.50		
Belen	$2,948	4732.50		
Farmington	$2,948	10153.00		
Truth or Cons.	$2,945	1771.00		
Aztec	$2,942	3283.50		
House	$2,936	119.00		
Grady	$2,915	159.50		
Deming	$2,912	5326.00		
Los Lunas	$2,887	7946.50		
Cloudcroft	$2,884	545.00		
Dexter	$2,883	1161.50		
Carrizozo	$2,880	222.50		
Moriarty	$2,870	4643.50		
Gallup	$2,861	13815.00		
Quemado	$2,858	214.50		
Eunice	$2,849	780.00		
Hobbs	$2,848	8114.50	22012.0	$2,848
Gadsen	$2,829	12000.50	13897.5	

DIST	REV/ MEM.	TOTAL MEM.	CUM MEM.	REV/MEM AT 95/5%
Lake Arthur	$2,787	245.50	1897.0	
Dulce	$2,783	718.00	1651.5	
Hagerman	$2,777	475.50	933.5	
Floyd	$2,725	261.50	458.0	
Des Moines	$2,672	196.50	196.5	
TOTAL:		317777.00		$411

5% OF MEM 15,888.85 DISPARITY 14.43%

TITLE 5--GOVERNMENT ORGANIZATION AND EMPLOYEES
PART I--THE AGENCIES GENERALLY
CHAPTER 5--ADMINISTRATIVE PROCEDURE
SUBCHAPTER II--ADMINISTRATIVE PROCEDURE

Sec. 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved--

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include--

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply--

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons

therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except--

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 383.)

No. 05-1508

In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO.1

Petitioners,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR THE PETITIONERS

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QUESTIONS PRESENTED

The question presented is:

1. Whether the Secretary has the authority to create and impose his formula over the one prescribed by Congress and through this process certify New Mexico's operational funding for fiscal year 1999-2000 as "equalized," thereby diverting the Impact Aid subsidies to the State and whether this is one of the rare cases where this Court should exercise its supervisory jurisdiction to correct a plain error that affects all State school districts that educate federally connected children.

LIST OF PARTIES

Petitioners are New Mexico public school districts: the Zuni Public School District No. 89 and the Gallup-McKinley County Public School District No. 1. Respondents are the United States Department of Education and the New Mexico Public Education Department.

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OPINIONS BELOW

The *en banc Per Curiam* ruling of the United States Court of Appeals for the Tenth Circuit dated February 23, 2006 is officially reported at 437 F.3d 1289 and is reproduced in Pet. App. at 1a.

The original Opinion of the United States Court of Appeals for the Tenth Circuit dated December 30, 2004 is officially reported at 393 F.3d 1158. It was vacated by the *en banc* ruling. It is reproduced in Pet. App. at 3a.

The decision of the Secretary of the United States Department of Education dated October 11, 2001 is reproduced in Pet. App. at 34a.

JURISDICTION

This Court has jurisdiction to review the *en banc* of the United States Court of Appeals for the Tenth Circuit pursuant to 28 U.S.C. §1254. Federal jurisdiction in the Circuit Court was present under 20 U.S. C. § 7711(b)(1) which allows appeals of decisions of the Secretary to the United States Court of Appeals.

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The statutory and regulatory provisions relate to the federal Impact Aid Program and are:

1. 20 U.S.C. §240(d) repealed (Pet. App. at 69a)
2. 20 U.S.C. § 7709 (2000) (Pet. App. at 59a)
3. 34 C.F.R. Part 222, Subpart K (2000) (including Appendix. to Subpart K) (Pet. App. at 76a)
4. Former 34 C.F.R. §222.63 (1993) (Pet. App. at 97a)

5. Former 34 C.F.R. Appendix §222 (1993) (Pet. App. at 99a)

6. 5 U.S.C. §553 (JA 93-94)

STATEMENT

This case concerns the Secretary of Education's failure to obey the statutory command of 20 U.S.C. § 7709(b)(2)(B) to use a certain formula in making state school funding "equalization" calculations in connection with the Federal Impact Aid Program established by 20 U.S.C. § 7709, *et. seq.* Instead, the Secretary has chosen to use a different formula to make those calculations - a formula which substitutes the Secretary's policy choices for the policy choices made by the Congress when the statutory formula was enacted in 1994.

The Zuni Public School District is a New Mexico public school district located entirely within the Pueblo of Zuni Reservation. It has virtually no tax base. Over 65% of the Gallup-McKinley County Public School District No. 1 consists of Navajo Reservation lands which are also not taxable by State school districts. Under the Impact Aid Program (20 U.S.C. § 7709 *et seq.*) public school districts such as Zuni and Gallup impacted by a federal presence which reduces ordinary bonding and taxing capacity are entitled to receive Federal Impact Aid funding to offset this impact. *Indian Oasis-Baboquivari Unified School District No. 40 of Pima County v. Kirk*, 91 F.3d 1240 (9th Cir. 1996). The Impact Aid Program, however, provides an exception. It allows States to take credit for the Impact Aid payments by correspondingly reducing the amount of operational funding the State would otherwise provide to Impact Aid districts if the State can establish that state provided operational funding

for its school districts (statutorily referred to as Local Educational Agencies or LEAs) is otherwise "equalized."

As authorized by statute in 1974 (20 U.S.C. § 240(d), Pet. App. at 69a), the Secretary of Education originally established the equalization formula by regulation in 1976 (Pet. App. at 159a).

In 1994, however, Congress legislatively removed from the Secretary the authority to create the equalization formula and legislatively established a new formula (Pet. App. at 59a). Under Congress' 1994 formula (the current statutory formula) a State's operational funding is considered equalized if there is no more than a 25% disparity in per-pupil revenues between the highest and lowest per-pupil revenues of LEAs which are ranked in order of per-pupil revenues. The statute then requires that the Secretary reduce the field of LEAs which will be examined to determine if the 25% disparity is exceeded by disregarding "local educational agencies (LEAs) with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State. . . ." (20 U.S.C. §7709(b)(2)(B)) (Pet. App. at 61a). As explained in detail further in this brief, the statutory formula for developing the final field of LEAs differed from the Secretary's 1976 regulatory formula because the Secretary's formula involved a process of eliminating "percentiles of pupils" in attendance at all LEAs as the means for reducing the final field of LEAs as to which the disparity test would be applied. This step in the old formula was eliminated by the 1994 statute.

Following enactment of the 1994 statute the Secretary, by 1995 regulation, recited the statutory formula in the body of the regulation, but in an Appendix to the regulation resurrected the Secretary's 1976 formula. The Secretary has

continued to follow the 1976 formula ever since (Pet. App. at 200a and 217a).

The Secretary's formula as applied to New Mexico for fiscal year 2000 (July 1, 1999-June 30, 2000) eliminated 23 of the State's 89 LEAs (26%) before applying the 25% disparity standard. The statutory formula eliminates 10 of the LEAs (11%). Under the Secretary's formula, New Mexico is "equalized" and is permitted to reduce operational funding to the federally impacted districts by the amount of their Impact Aid receipts.[1] Under Congress' formula, New Mexico is not equalized and New Mexico's federally impacted districts are entitled to retain their additional share of approximately $50,000,000 per annum of Impact Aid funds without suffering offsetting reductions in their state provided operational funding. This $50,000,000 is approximately 2.7% of the State's annual operational expenditures for public education. (Pet. App. at 201a, 234a-236a).

An annual certification hearing before the United States Department of Education is conducted to determine whether a State's operational funding is equalized. (Pet. App. at 205). This hearing was conducted for fiscal year 2000 and objection was made to the Secretary's use of the old formula reproduced in the Appendix as opposed to the new statutory formula. (Pet. App. at 222a) The Secretary insisted on using the Appendix formula and New Mexico's funding was determined to be "equalized" under that formula. (Pet. App. at 41a) Petitioners protested and sought a hearing before a United States Department of Education administrative law judge pursuant to 20 U.S.C. § 7711(a).

The administrative law judge questioned how the Secretary's formula could be reconciled with the statute, but

---

[1] New Mexico by statute takes credit for 75% of the Impact Aid payments. NMSA 1978 § 22-8-25. (Pet. App. at 72a)

ruled that as an employee of the Federal Department of Education he did not have the jurisdiction to rule on the validity of the Secretary's formula and confirmed that New Mexico was "equalized" under the Secretary's formula. (Pet. App. at 43a) That decision was appealed to the Secretary. The appeal was denied. (Pet. App. at 34a)

Petitioners appealed to the Tenth United States Circuit Court of Appeals pursuant to 20 U.S.C. § 7711(b)(1). A three judge panel of the Tenth Circuit issued its opinion on December 30, 2004. Two of the judges affirmed the decision of the Secretary and one judge dissented. (Pet. App. at 3a) Petitioners successfully petitioned for rehearing *en banc*. Months after a second oral argument, the Tenth Circuit announced that the 12 members of the *en banc* panel were evenly divided and no decision would be issued, and that the panel decision was vacated. (Pet. App. at 1a) The decision of the Secretary stood by default.

SUMMARY OF ARGUMENT

Petitioners contend that they, and other similarly impacted LEAs, are entitled to receive federal Impact Aid payments without offset against their State operational funding, because the State of New Mexico does not qualify for the Impact Aid equalization exception. That exception permits such offset when a State demonstrates that the operational funding it provides to its LEAs is "equalized" under a formula statutorily created within the Impact Aid Act. Petitioners' specific objection is that the Secretary is not following the statutory formula. In particular, the Secretary's formula does not contain the percentile calculations required by the statute for determining the final list of LEAs (ranked by per-pupil revenues) against which the statute's 25% disparity test is applied. Instead, the Secretary's formula injects a wholly extraneous step involving elimination of LEAs based on their

pupil attendance numbers, a criterion not included in the statutory formula. The Secretary continues to use a formula created by regulation in 1976 which was supplanted by the statute in 1994. New Mexico has "equalized" its operational funding under the Secretary's formula. It has not done so under the statutory formula.

ARGUMENT

A. THE LEGISLATIVE AND REGULATORY HISTORY SHOWS HOW TWO IMPACT AID FORMULAS EMERGED - ONE AUTHORIZED BY THE SECRETARY; ONE AUTHORIZED BY CONGRESS

The evolution of the current statutory formula and the Secretary's conflicting formula can best be understood by review of the legislative and regulatory history. The legislative and regulatory sequence is as follows.

1. Prior to 1974, all Impact Aid went to the impacted school districts. Chapter 1124 - Pub. L. 874.

2. In 1974, Congress enacted 20 U.S.C. § 240(d) (Pet. App. at 69a), which was later repealed in 1994 by Pub. L. 103-382. The 1974 statute allowed States to take "into consideration, Impact Aid payments, provided there were equalized operational expenditures made to school districts." The term "equalized expenditures" was to be "defined by the Secretary by regulation." (Pet. App. at 70a)

3. The Secretary followed a public notice-and-comment procedure in developing these regulations in 1976. The Secretary proposed in draft regulations that the LEAs would be ranked in order of LEAs' per-pupil revenues. A comparison would then be made between the per-pupil revenue of the highest and lowest ranked LEAs. (Pet. App. at 159a) However, the Secretary was concerned that if all LEAs

were included in the rankings, anomalies associated with top ranked and bottom ranked LEAs might distort the true nature of a State's operational funding. (41 F.R. 26320, 26323-26324, "Response" at Pet. App. at 130a-131a) During the public notice-and-comment proceedings, comments focused on the best method for reducing the field of LEAs. Part of the discussion focused on whether it was preferable to eliminate percentiles of LEAs or to eliminate percentiles of pupils as a device for then eliminating LEAs in developing the final field of LEAs as to which the equalization or "disparity" determination would be made. Some commentators recommended the percentile elimination of LEAs. Others recommended the percentile elimination of pupils:

> **Comment**. Regarding the procedure for calculating the "disparity" standard in §115.62(b), one commentator was not sure whether pupils or school districts are to be considered when determining the 95th and 5th percentiles, while two commentators advocated that the 95th and 5th percentile exclusions be based on number of school districts and not on number of pupils in excluding the school districts. A fourth commentator argued that calculating a disparity between school districts would have the effect of minimizing the real school-by-school disparities in States with small numbers of school districts while exposing those disparities in States with large numbers of districts. The commentator offered an alternative scheme of his own design for calculating a measure of fiscal neutrality. The scheme would incorporate into a single index measures of wealth disparity and percentage of local revenues equalized to allow for considerations of fiscal neutrality based programs. [Pet. App. at 130-130a]

The Secretary then responded at 130a -131a:

> **Response**. The interim regulation has been rewritten to make it clear that the referenced percentiles are based on numbers of pupils. Section 115.62(b)(1) provides that in calculating the disparity standard according to procedures set forth in Appendix A, the districts in the State will be ranked on the basis of current expenditures or revenue per pupil, and that those districts which fall above the 95th or below the 5th percentile of those agencies in terms of the number of pupils in attendance in the schools of those agencies will be excluded for the purposes of the calculation. The percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts. However, it appears that the proposed regulation may not have been as clearly expressed as desired. In regard to the question of pupils versus districts for the percentiles used in calculating the disparity standard, it is the commissioner's view that basing an exclusion on the number of districts would act to apply the disparity standard in an unfair and inconsistent manner among states. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In states with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those states. Conversely, in states with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics. [Emphasis added]

4. The Secretary then promulgated the new regulations in 1976, incorporating the percentile elimination of pupils into his new "equalization" formula. (Pet. App. at 141-142) The actual formula was produced as Appendix A to a new Subpart G to Part 115 of Title 45 of the Code of Federal Regulations. (Pet. App. at 142a and 159a) The regulations were codified as 34 C.F.R. 222.63 (1993). (Pet. App. at 97a)

The Secretary, in the body of the regulation (§ 115.62(b)), established the permitted disparity limit between the top ranked and bottom ranked LEA for per-pupil revenue and expenditures at 25%, but did not further define the process to be used for making the equalization determination except through the Appendix to the regulation. (Pet. App. at 99a, 159a)

The Appendix to the 1976 regulation provided:

Appendix

The determination of disparity in current expenditures or revenues per pupil is made by:

(a) Ranking all local educational agencies having similar grade levels within the State on the basis of current expenditures or revenues per pupil with respect to the fiscal year for which data has been submitted in accordance with these regulations;

(b) Identifying those local agencies in each ranking which fall at the 95th and 5th percentiles of the **total number of pupils in attendance** in the schools of these agencies; and

(c) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (b) and dividing the difference by the lower figure.

Example: In State X, after ranking all local education agencies organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in these agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1000. The percentage disparity between the 95th and 5th local educational agencies is 22 percent ($1000-$820=$180/$820). The program would be deemed to qualify. (Pet. App. at 159a - 160a) [Emphasis added].

5. Congress changed the system with enactment of 20 U.S.C. § 7709 in 1994.

Section 20 U.S.C. § 7709(b) provides:

(1) In general

A State may reduce State aid to a local educational agency that receives a payment under section 7702 or 7703(b) of this title (except the amount calculated in excess of 1.0 under subparagraph (B) of section 7703(a)(2) of this title) or under the Act of September 30, 1950 (Public Law 874, 81st Congress) [20 U.S.C.A. §§ 236 to 244] as such Act was in effect on the day preceding October 20, 1994 (other than an increase in payments described in paragraphs (2)(B), (2)(C), (2)(D), or (3)(B)(ii) of section 3(d) of such Act of September 30, 1950 [20 U.S.C.A. § 238(d)]) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that such State has in effect a program of State aid that

equalizes expenditures for free public education among local educational agencies in such State.

(2) Computation

(A) In general

For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

(B) Other factors

In making a determination under this subsection, the Secretary shall–

(i) disregard local educational agencies with **per-pupil expenditures or revenues** above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and

(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities. [Emphasis added]

This statute eliminated the Secretary's authority to establish the equalization formula by creating a new and different

equalization formula. Now, instead of eliminating LEAs based on their numbers of pupils above the 95th percentile and below the 5th percentile, the statute required the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." (emphasis added) (§ 7709(b)(2)(B)(i)). This reversed the Secretary's 1976 decision to eliminate LEAs based on the percentile elimination of "the total number of pupils" by now requiring the elimination of LEAs based solely on their per-pupil revenues in selecting the final field as to which the disparity standard would be applied. (Pet. App. at 61a)

6. On September 29, 1995, in Vol. 60 Federal Register 50778, *et. seq.*, the Secretary promulgated Regulation Subpart K to 34 C.F.R. Part 222. (Pet. App. at 163a and 173a) This was subsequently codified at 34 C.F.R. Section 222.160 (Subpart K). (Pet. App. at 76a and 81a) The purpose of the regulation was to "implement the provisions of Section 8009 and [did] not establish definitions and standards for any other purpose."[2] (§222.160(b) (Pet. App. at 76a) New regulation Section 222.162 included the new statutory formula:

> §222.162. What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?
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> (a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25%. In determining the disparity percentage, the

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[2] This refers to Section 8009 of Title VIII, Public Law 103-382, 108 Stat. 3764-3767 later codified as 20 U.S.C. § 7709.

> Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart. [Emphasis added].

This regulatory language is consistent with the equalization provisions of the 1994 statute as set out through §§ 7709(b)(1) and (2)(A). However, the Secretary then referred to the Appendix to Subpart K (Pet. App. at 92a-96a) as purporting to "describe the methods for making certain calculations in conjunction with determinations made under the regulations in this Subpart." Instead of using the method reflected in the 1994 statute, the Secretary virtually repeated the Appendix to the 1976 regulation (compare Brief, *supra*, p.11), making only some stylistic changes, thereby trumping Congress' formula with the Secretary's own. The current Appendix to the Regulation provides (Pet. App. at 92a-93a):

> Appendix
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> The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this part. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these determinations.
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> The determination of disparity in current expenditures or revenues per pupil are made by –
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> (i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second proceeding fiscal year before the year of determination;

(ii) identifying those LEAs in each ranking that fall at the 95th and fifth percentile of the total **number of pupils in attendance** in the schools of those LEAs; and

(iii)subtracting the lower current expenditure or revenue per pupil figure from the higher of those agencies identified in paragraph (ii) and dividing the difference by the lower figure

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820=$180/$820). The program would meet the disparity standard for fiscal years before fiscal year 1998 but would not for subsequent years. (Pet. App. 93a). (Pet. App. at 92a. 93a) [Emphasis added].

The quoted example from the current Appendix (Pet. App. at 93a) is virtually identical to the example set out in the Appendix to the 1976 regulations (Pet. App. at 160a). The numbers in the 1995 Appendix example were not even adjusted for 18 years of inflation from the numbers used in the 1976 Appendix.[3]

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[3] One difference in the examples to the 1976 and the 1995 regulations is the wording in the later Appendix stating that the resulting 22% disparity in the Example "would meet the disparity standard for fiscals years before fiscal year 1998 but would not for subsequent years." That conclusion

The Secretary then continued and continues to use his old formula and not the statutory formula, ostensibly relying upon the Appendix for justification.

B. THE TWO IMPACT AID FORMULAS ARE RADICALLY DIFFERENT

Congress' 1994 formula at 20 U.S.C. §7709(b)(2)(B)(i) requires that in making determinations under the subsection the Secretary shall:

> I. Disregard local educational agencies with **per pupil expenditures or revenues** above the 95th percentile or below the 5th percentile of such expenditures or revenues in this State. (Emphasis added).

This is in contrast to the Secretary's Appendix which provides:

> The determinations of disparity are made by ranking all LEAs and then identifying those LEAs in each ranking that fall at the 95th and 5th **percentiles of the total number of pupils in attendance** in the schools of those LEAs. (Emphasis added).

The statute requires exclusion of LEAs whose per-pupil expenditures or revenues are above the 95th percentile and below the 5th percentile of per-pupil expenditures or revenues in the State.

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reflected another provision of the 1994 statute which required a reduction in the disparity spread from 25% to 20% to be effective 1998 or 1999. Pub. L. 103-382 Sec. 101, 108 Stat. 3765, Act of Oct. 20, 1994. That change was removed from the statute by amendment in 1996. Pub. L. 104-195, Sec. 10, 101 Stat. 2384, Act of Sept. 16, 1996. The permitted disparity spread remains at 25% per § 7709(b)(B)(i).

The word "percentile" as used in the statute has a well-defined meaning both in ordinary usage and in the realm of statistics: (1) Webster's Ninth New Collegiate Dictionary, p. 872 (1986 Merriam-Webster, Inc.) - "percentile. . . : a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it <a percentile score of 95 is a score equal to or better than 95 percent of the scores>."; (2) Merriam-Webster's Collegiate Dictionary Tenth Edition, p. 859 (2001 - Merriam-Webster, Inc.) - "percentile. . .: a value on a scale of one hundred that indicates the percent of a distribution that is equal to or below it <a score in the 95th percentile>"; (3) Hinkle, D. Wiersma, W., & Jurs, S., Applied Statistics for the Behavioral Sciences, pp. 49-50 (1994, Boston: Houghton Mifflin Company) - "A percentile is the point in a distribution at or below which a given percentage of scores is found. For example, the 28th percentile of a distribution of scores is the point at or below which 28% of the scores fall."; (4) Anderson, Sweeney & Williams, Statistics - Concepts and Applications, pp. 64-66 (West Publ. 1986):

> Percentiles
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> A percentile is a statistical measure that locates values in the data set that are not necessarily central locations. In addition to identifying locations, this measure provides information regarding how the data items are spread over the interval from the lowest to the highest values. Hence, percentiles can also be viewed as measures of dispersion, or variability, in the data set. In large data sets that do not have numerous repeated values, the *p*th percentile is a value that divides the data set into two parts. Approximately p percent of the items take on values less than the *p*th percentile; approximately (100 - *p*) percent of the items take on greater values.

Percentile

> The *p*th percentile of a data set is a value such that at least *p* percent of the items take on this value or less and at least (100 – *p*) percent of the items take on this value or more.
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> Admission test scores for colleges and universities are frequently reported in terms of percentiles. [4]

There are established standard methods for making a percentile calculation.[5] All produce percentile calculations as required by the statutory formula if applied to the data contained in an array of any State's LEAs ranked in order of their per-pupil revenues. None of these methods permit the injection of or consideration of any other factors e.g. pupil attendance numbers, in the calculation. Thus, where the objective is to calculate where the 95th and 5th percentiles fall along the array of LEAs ranked by their per-pupil revenues, no consideration can be given to other factors such as pupil

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[4] The word "percentage" means something quite different than the word "percentile." "Percentage" is defined as follows in (a) Webster's Ninth New Collegiate Dictionary, p. 872 (1986 Merriam-Webster, Inc.) and (b) Merriam-Webster's Collegiate Dictionary Tenth Edition p. 859 (2001 – Merriam-Webster, Inc.) – "percentage . . .: 1 a: a part of a whole expressed in hundredths b: the result obtained by multiplying a number by a percent."

[5] *See*, the U.S. Department of Commerce's (National Institute of Science & Technology) website setting out the "NIST SEMATECH e-Handbook of Statistical Methods. http: www.itl.nist.gov.div898 handbook.date." The part of that handbook which explains how to calculate percentiles can be found at http://www.itl.nist.gov/div/898/handbook/prc/section 2/prc262.htm. The handbook notes various standard methods for calculating percentiles, including the EXCEL program used by Judge O'Brien in his dissent to the Tenth Circuit's original panel decision. (Pet. App. at 24a, n.11).

attendance numbers. Thus, the Secretary's injection of a pupil attendance factor into the calculation is plainly at odds with the statute.

The Secretary arguably could have acted by regulation to require use of a particular one of the established standard percentile calculation methods for calculating the 95th and 5th percentiles as required by the statute, so long as the regulation did not require or permit the use of any data or factor beyond each LEA's per-pupil revenues in the calculation; but, that would have been the extent of the Secretary's authority. *See*, Part F.4, *infra* of this Brief. However, the Secretary did not do this. The Secretary's formula does not require calculation of the 95th and 5th percentiles based on the array of LEAs ranked by per-pupil revenues nor does it exclude from that list the LEAs whose per-pupil revenues fall above or below those percentiles. Instead, the Secretary's formula determines how to trim the list of LEAs based on consideration of their pupil attendance numbers, a criterion foreign to the statute. This is evident from examination of the Secretary's formula.

The first step in the Secretary's formula correctly ranks the LEAs by per-pupil revenues. (Pet. App. at 92a and 210a; *see*, Figure 1 *infra* at p. 20). The Secretary then proceeds to eliminate LEAs from the final field. *Id.* However, the Secretary does not do this by elimination of LEAs whose per-pupil revenues fall above the 95th and below the 5th percentiles (based on their ranking by per-pupil revenues) as required by the 1994 statute. Instead, as shown by Appendix K to the 1995 regulation, (Pet. App. at 92a-93a and quoted, *supra* at pp. 13-14) the Secretary has adopted an unrelated process which calls for excluding LEAs (from the top and bottom of the ranked list of LEAs) whose cumulative pupil attendance numbers are below the 5th percentile or above the 95th

percentile of total pupil attendance numbers.[6] This procedure is plainly illustrated in the example to Appendix K as set out on page 14, *supra*. The results of applying this procedure to New Mexico's LEAs for fiscal year 2000 is illustrated on the chart reproduced in Pet. App. at 210a, an excerpt from which is shown as Figure 1, *infra*, at p. 20.

As shown on Figure 1, the Secretary's formula as applied for fiscal year 2000 excludes (from the list of New Mexico LEAs ranked by per-pupil revenues) the top and bottom ranked LEAs whose cumulative pupil attendance numbers fall just short of accounting for 5% of total pupil attendance statewide (15,888) on each end of the list, based on a total State pupil attendance of 317,777.[7] (Pet. App. at 210a -213a). The

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[6] Notwithstanding the references to percentiles in the text of the Appendix at Pet. App. at 92a (quoted *supra*, at p. 14), the Secretary's procedure as applied does not actually involve calculation of the 95th and 5th percentiles even based on pupil attendance numbers, because the LEAs are never ranked and ordered by pupil attendance numbers and then subjected to a percentile calculation. The Secretary's formula would have to require such a ranking to run a ***percentile*** calculation based on a pupils attendance numbers. The example in the regulations (quoted *supra* at p. 15) and the Secretary's practice (as shown by Figure 1) is instead to determine a ***percentage*** of total pupil attendance numbers (5%) - and to exclude as many LEAs from the top and bottom of the list of LEAs as necessary to exclude those LEAs accounting for just under 5% of total student population from each end of that list. *See*, fn. 7. This process is even further removed from the statutory mandate.

[7] The Secretary's formula does not exclude the highest and lowest LEA whose pupil attendance numbers must be included to reach (and exceed) the number representing 5% of total pupil attendance for that year. *See*, Figure 1, where Peñasco's inclusion is required to reach (and exceed the number representing 5% of total pupil attendance on the top end of the list; and, inclusion of Hobbs is required to reach (and exceed) the number representing 5% of the total pupil attendance on the bottom end of the list, but neither district is excluded.

Figure 1 (Excerpt from Pet. App. 210a-213a with LEAs ranked by per-pupil rev. – N.M. Dept. of Ed. calcu.):

LEA NO.	DIST	REV/ MEM	TOTAL MEM	CUM. MEM	REV/MEM AT 95/5%
89	Mosquero	$6,520	57.00	57.0	
88	Corona	$5,791	81.00	138.0	
87	Los Alamos	$5,611	3509.50	3647.5	
86	Vaughn	$4,641	111.50	3759.0	
85	Hondo Valley	$3,690	157.50	3916.5	
84	Maxwell	$3,591	152.00	4068.5	
83	Mora	$3,530	707.50	4776.0	
82	Roy	$3,516	113.00	4889.0	
81	Logan	$3,484	278.00	5167.0	
80	Cuba	$3,404	773.00	5940.0	
79	Silver City	$3,391	3837.50	9777.5	
78	Texico	$3,335	498.00	10275.5	
77	Zuni	$3,320	1696.00	11971.5	
76	Springer	$3,295	285.50	12257.0	
75	Jemez Valley	$3,286	513.50	12770.5	
74	Ruidoso	$3,278	2408.00	15178.5	
73	Tatum	$3,266	369.00	15547.5	
72	Penasco	$3,259	709.50	16257.0	$3,259
* * [Data on LEAs from Center of List Excluded] * *					
7	Hobbs	$2,848	8114.50	22012.0	$2,848
6	Gadsen	$2,829	12000.50	13897.5	
5	Lake Arthur	$2,787	245.50	1897.0	
4	Dulce	$2,783	718.00	1,651.5	
3	Hagerman	$2,777	475.50	933.5	
2	Floyd	$2,725	261.50	458.0	
1	Des Moines	$2672	196.50	196.5	
Total			317,777.00		$411
5% OF MEM 15,888.85			DISPARITY 14.43%		

Figure 2 (Excerpt from Pet. App. at 30a-33a identifying LEAs ranked by number from lowest to highest based on per-pupil revenues):

EXHBIT A JUDGE O'BRIEN'S DISSENT

Impact Aid Disparity for 1999-2000

District	Revenue/Member	LEA No.
1 Mosquero	$6,520.00	89
2 Corona	$5,791.00	88
3 Los Alamos	$5,611.00	87
4 Vaughn	$4,641.00	86
5 Hondo Valley	$3,690.00	85
1st district ABOVE 95th Percentile		
$3,650.40 = 95th Percentile		
6Maxwell	$3,591.00	84
[Data on LEAs from Center of List Excluded]		
84 Gadsden	$2,829.99	6
$2,803.80 = 5th Percentile		
1st district below 5th Percentile		
85 Lake Arturn	$2,787.00	5
86 Dulce	$2,783.00	4
87 Hagerman	$2,777.00	3
88 Floyd	$2,725.00	2
89 Des Moines	$2,672.00	1
District	Revenue/Member	
Total	$284,095.00	
Mean	$3,192.08	
Median	$3,059.00	
95th Percentile	$3,650.40	
5th Percentile	$2,803.80	

Secretary's formula then simply pretends that the outcome of that calculation identifies the LEAs which fall above the 95th and below the 5th percentiles of LEAs ranked by per-pupil revenue. This pretense does not remotely resemble the kind of percentile calculation required by the statute.

By using a formula which eliminates LEAs based on *percentages of pupils* instead of eliminating LEAs whose per-pupil revenues fall above the 95th percentile or below the 5th percentile (based on per-pupil revenues), the Secretary excludes many New Mexico LEAs from the final field whose per-pupil revenues in fact fall between the 95th and the 5th percentiles of those LEAs when ranked by per-pupil revenues. *Compare,* Figure 1 and Figure 2 (excerpt from chart appended to Judge O'Brien's dissent); *see* p.21, *supra*.

Comparison of Figure 1 and Figure 2 clearly shows that the Secretary's formula excluded 13 more LEAs from the final list as to which the disparity test was applied, reducing that field to 66 from the 79 LEAs as required by the statutory formula and changing the outcome. New Mexico meets the 25% disparity test under the Secretary's formula: $3,259 - $2,848 = $441; 441/2848 14.43% = 14%; New Mexico does not meet the disparity test under the statutory formula using the highest and lowest non-excluded LEAs as identified by the 95th ($3,650.40) and 5th ($2,803.80) percentile values calculated with the EXCEL program used in Judge O'Brien's dissent: $3,591.00 - $2,829.99 = 761.01; 761.01/2829.99 - 26.90% = 27%. (Pet. App. at 24a)

That well reasoned dissent in the withdrawn Tenth Circuit Court of Appeals panel decision succinctly describes the two methods:

> These requirements [of the statutory formula] are unambiguous. A percentile is a mathematical concept not admitting of multiple interpretations; it is a simple,

straightforward method of ranking an array of values. Attached to this dissent is Exhibit A. It lists all of the 89 New Mexico LEAs along with the per-pupil revenues for each. (Pet. App. at 30a-32a) Analysis of that array yields a value of $3,650.40 for the 95th percentile and $2,803.80 for the 5th percentile. Five districts are above the 95th percentile and five districts fall below the 5th percentile; they are excluded from further analysis. After the exclusion, Gadsden district has the lowest per-pupil revenues ($2,829.00). When those revenues are multiplied by 125% the result is $3,536.00, an amount less than the highest non-excluded district, Maxwell - with per-pupil revenues of $3,591.00. The 25% test is not met.

The dissent then continues and describes the Secretary's formula. (Pet. App. at 25a)

> Rather than abide the statutory command to apply a mathematical function to an array of numbers, the Department adopted regulations directing a complex and mystifying formula for determining which LEAs fall into the 5th and 95th percentiles of per-pupil expenditures. 34 C.F.R. 222.162, *et. seq.* The regulations start correctly by requiring LEAs to be arrayed according to their per-pupil expenditures (or revenues). Next, and inexplicably, they require a calculation of 5 per cent of the total number of pupils in the state. The number of LEAs necessary to use up 5% of the state's student population <u>at both ends of the list</u> are eliminated from consideration in applying the 25% formula. Then the per-pupil expenditures of the highest and lowest remaining LEAs are used to determine whether there is less than a 25% disparity in funding and, therefore, "equalization." That seems quite at odds with the statute's directive to disregard

> LEAs "with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.

The dissent's description of the process followed by the Secretary exactly tracks the State Department of Education's calculation using the Secretary's formula as set out at Pet. App. at 210a *et seq.* and the Secretary's formula as set out in the Appendix to 1995 regulation (Pet. App. at 92a-93a).

When Congress in 1994 decided by statute to establish the equalization formula, it rejected the Secretary's 1976 equalization formula. The Secretary's formula had by then been in force for 18 years without any apparent confusion. Had Congress wished to statutorily capture the Secretary's formula, the language was there for the taking. Instead, Congress chose a different course. Historically, the Secretary was aware of the important statistical difference between eliminating LEAs based on the pupil attendance numbers and eliminating LEAs based on per-pupil revenues. The Secretary knew that each method suffered from similar, but opposite defects. States with large numbers of small LEAs with relatively small student populations (as is the case in New Mexico) would have larger numbers of LEAs eliminated from the disparity calculation if percentiles of pupils were used in the calculation. States with fewer (and larger) LEAs would be subjected to other statistical infirmities if percentiles of LEA per pupil revenues were used to create the field of LEAs. (Pet. App. at 130a-131a).

As revealed in the public notice and comment proceedings in 1976, each method had its champions and detractors. Others felt that both methods were flawed. Of importance, however, is that these two methods are distinct and are mutually exclusive. Congress clearly chose to require the Secretary to stop eliminating LEAs based on pupil attendance

numbers in making the equalization calculation and instead to eliminate LEAs based on per-pupil revenues as specified in the statute. The Secretary's method is not an interpretation of the statutory method. One method is not a slightly different permissible variation from the other. One method cannot fill a gap left by the other. The Secretary's formula directly conflicts with and is irreconcilable with the statutory formula.

The administrative law judge (ALJ) in the administrative proceedings below also challenged Respondents' position that the Secretary's formula was the same as required by statute through questions put to Respondents' counsel about the difference between the formulas set out in the Appendix and in the statute. Not being able to resolve the difference, the response was that there was a "substantial difference between what . . . Congress intended . . ." and what "Congress in fact put in there" and that Congress was not "100% accurate with their language." The ALJ then stated: "In other words, the statute does not support the regulation? It's different." Department counsel then admitted "it is different." (JA 27). When asked by the ALJ if the Secretary and counsel could show the judge how "the statute's ambiguous," counsel for the Secretary responded: "The only way I can do that is by reference to the statutory purpose." (JA 29).

When the New Mexico Department of Education's counsel was confronted with the same questions and was asked by the ALJ to explain the argument in the State's "brief on the main issue [which maintained] . . . that the statute is consistent with the use of the student population. . .," the State's counsel responded: "We've done a lot of thinking about this issue and this conflict that seems to appear, and I am not certain that we would state that so plainly at this time. It is arguable that there is a difference, and we would defer to Mr. Smith on the Department's interpretation." (JA 47). When again pushed to explain how the regulation could be

held to be consistent with the statute, the response was that the State: "Would agree with the Department that the only reasonable way of determining disparity is on a per-pupil expenditure considering the students and not the LEAs." Again when asked whether the regulation was consistent with the statute, the State replied: "Literally, on the face of the words, perhaps not, probably not."

The Secretary's expert opined (JA 6) that the Secretary's formula was consistent with the statute but then opined that Petitioners' insistence on "applying percentiles to the revenues per membership of the highest and lowest LEAs in the State and then excluding LEAs with per-pupil revenues above or below the product of those calculations is not a proper method of restricting the range of the disparity test." (JA 6, ¶9). Since this method is precisely what the statute requires, the Secretary's expert has by these words admitted that the Secretary's formula deviates from the statutory formula in ways he and the Secretary believe desirable, but which in fact are prohibited.

Thus, as shown in Exhibit A to Judge O'Brien's dissent (Pet. App. at 30a-33a) and in the Table at Pet. App. at 210a-213a, New Mexico is not equalized under the statutory formula. *Compare,* Figure 1 and Figure 2, *supra.*

C. THE SECRETARY HAS NO AUTHORITY TO SUBSTITUTE HIS POLICY CHOICES REGARDING THE PROPER IMPACT AID FORMULA FOR THOSE OF THE CONGRESS

Each method of trimming the final field of LEAs used to make the disparity assessment risks (different) inequitable outcomes or anomalies in some circumstances. Which method is deemed the most appropriate ultimately reduces to a policy choice about which anomalies and inequities are the most tolerable. Congress could have delegated this call to the

Secretary, but it did not. It made this call itself in clear statutory language. *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 314, 315-317 (1993). In *Beach*, this Court affirmed the legislative judgment of Congress in drawing the lines reflected in the F.C.C. statute to distinguish between different classes of communications media in applying media ownership rules. The Court noted that "[d]efining the class of persons subject to a regulatory requirement – much like classifying governmental beneficiaries – 'inevitably requires that some persons that have an almost equally strong claim to favored treatment be placed on different sides of the line, and the fact [that] the line might have been drawn differently at some points is a matter for legislative, rather than judicial, consideration.'" *Id.* at 315-317.

The same fundamental separation of powers principles which bar the Courts from substituting their judgment for the judgment of Congress on where to draw such lines in such circumstances likewise bars the Executive Branch from substituting its judgment on such questions. Instead, the Executive Branch's duty to "take care that the Laws be faithfully executed" leaves Executive Agencies with no discretion and no power to substitute their own policy choices for those made by the Congress. Article II, § 3, U.S. Constitution; *Pennsylvania v. Wheeling and Belmont Bridge Company*, 59 U.S. (18 How.) 421, 15 L.Ed. 435 (1855) (Congress had the right to change its mind through new legislation and by such new legislation to authorize construction of a bridge on the Ohio River which the Court had previously held to be prohibited based on prior acts of Congress. "So long as the will of Congress was to leave the river unimpeded, any impediment was a violation of the public right [as previously defined by Congress]. But once Congress changed its mind, the contours of the right changed, and there was no more ground for injunctive relief);

Biodiversity Associates v. Cables, 357 F.3d 1152 (10th Cir. 2004) (Where Congress expressly changed the law defining the circumstances when certain timber cutting could occur, the Forest Service had the right and duty to permit timber cutting based on the new statutory standards and equitable relief granted against the Forest Service under the prior standard could not be maintained because that relief was no longer warranted under the new statutory standard). In *Cables*, the Tenth Circuit emphasized:

> But when Congress is exercising its own powers with respect to matters of public right, the executive role of 'tak[ing] Care that the Laws be faithfully executed,' U.S. Const. art. II, §3, is entirely derivative of the laws passed by Congress, and Congress may be as specific in its instructions to the Executive as it wishes.
>
> * * *
>
> To give specific orders *by duly enacted legislation* in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive; it is merely to reclaim the formerly delegated authority. (emphasis in original); *Stop H-3 Ass'n. v. Dole*, 870 F.2d 1419, 1437 (9th Cir. 1989)

Here, the statutory equalization formula mandates how to draw the lines to be used to measure whether the "no-greater-than-25%-disparity" standard has been violated. The Secretary's formula draws these lines differently–excluding many LEAs which in fact fall between the 95th and 5th percentiles on the list of LEAs ranked by per-pupil revenues as the statute requires. The Secretary's formula places different LEAs on one side of these lines than does the statutory formula, thus changing the outcome of the

equalization determination in New Mexico in ways clearly violative of the statute.

D. THE SECRETARY'S 1995 IMPACT AID FORMULA WAS NOT PROMULGATED AS A REGULATION INTENDED TO HAVE THE FORCE OF LAW

5 U.S.C. § 553 (JA 93-94) generally requires federal agencies to complete a public notice-and-comment process prior to promulgating regulations through rulemaking intended to have the force of law. There are exceptions. 5 U.S.C. § 553(b)(B) provides that the notice-and-comment requirements do not apply "when the agency for good cause finds (and incorporates the finding in a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impractical, unnecessary or contrary to the public interest." (JA 93-94).

The Secretary in 1995 promulgated regulations in response to Congress' 1994 legislation. In the Federal Register (Vol. 60, No. 189, p. 50774), the Secretary announced a "Waiver of Proposed Rulemaking" (Pet. App. at 163a) and exempted the regulation process from public notice-and-comment requirements. The new regulations, according to the Secretary, "merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor revisions. Thus, the regulations do not establish or affect substantive policy." 60 F.R. 50778 (Pet. App. at 163a)[8]

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[8] The Secretary also certified that "these regulations would not have a significant economic impact on a substantial number of small entities." (Pet. App. at 164a). But they do have a significant economic impact: they shift millions in annual Impact Aid funds from New Mexico LEAs to the State. (Pet. App. at 201a, 234a-236a)

Accordingly, the public notice-and-comment process, which was part of the Secretary's 1976 regulatory process, was eliminated from the 1995 regulatory promulgation process. Thus, as will be shown in Part F.3. *infra*, the Secretary's 1995 regulation was not published using the rulemaking process required to issue regulations intended to have the force of law.

E. THE CONTROLLING RULES ON STATUTORY CONSTRUCTION FORBID USE OF THE SECRETARY'S FORMULA

The controlling issue in this case is whether the Secretary had the authority to reinstate his 1976 formula after Congress in 1994 supplanted the Secretary's formula with Congress' own. This issue is controlled to a large extent by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984) and its progeny:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

1. CONGRESS HAS DIRECTLY SPOKEN BY REQUIRING USE OF A DIFFERENT FORMULA

The starting point in every case involving construction of a statute is the language itself. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 197 (1976); *TVA v. Hill*, 437 U.S. 153, 173 (1978); *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108 (1980); *Landreth Timber Co. v. Landreth*, 471 U.S. 681, 685 (1985). The language at issue is § 7709(b)(2)(B)(i) (Pet. App. at 61a). Here, the Secretary is instructed that in developing the field of LEAs used in determining equalization, the Secretary is required to "disregard local educational agencies [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." This is a simple and straightforward instruction. This language does not permit the conclusion that the Secretary was empowered to rank LEAs by per-pupil revenues and then eliminate LEAs based on their attendance numbers as a device for reducing the field of LEAs against which the 25% disparity determination is applied. *See*, "plain meaning" analysis *infra* at part E.2. The statute does not permit the Secretary to replace a *percentile* elimination of ranked LEAs with a *percentage* elimination using pupil attendance numbers.

Congress has spoken. The statute requires use of the statutory formula. Congress' formula is clear. That should be "the end of the matter." *Chevron*, 467 U.S. at 842.

2. THE PLAIN MEANING OF THE 1994 STATUTE REQUIRES USE OF THE STATUTORY FORMULA RATHER THAN THE SECRETARY'S FORMULA

Even if, *arguendo*, Congress' actions and intent were found to be not entirely clear, "traditional tools of statutory construction" would then come into play. If after this process

Congress' intent is clarified, that also ends the matter. *Chevron* at 843, n. 9 provides:

> The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. See, e. g., FEC v. Democratic Senatorial Campaign Committee, 454 U.S. 27, 32 (1981); SEC v. Sloan, 436 U.S. 103, 117-118 (1978); FMC v. Seatrain Lines, Inc., 411 U.S. 726, 745-746 (1973); Volkswagenwerk v. FMC, 390 U.S. 261, 272 (1968); NLRB v. Brown, 380 U.S. 278, 291 (1965); FTC v. Colgate-Palmolive Co., 380 U.S. 374, 385 (1965); Social Security Board v. Nierotko, 327 U.S. 358, 369 (1946); Burnet v. Chicago Portrait Co., 285 U.S. 1, 16 (1932); Webster v. Luther, 163 U.S. 331, 342 (1896). If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect.

"Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-448 (1987)." cited in *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004)

Some of the devices used in interpreting congressional action include a "natural reading," and considering "Congress' interpretive clues." *General Dynamics Land Systems, Inc.*, at 586. "[S]tatutory language must be read in context [since] a phrase 'gathers meaning from the words around it.'" *Id.* at 596. Viewing the "textual setting" is also employed. *Id.* at 597. "On the assumption that ambiguity

exists, we turn to examine the textual evolution of the limitation in question and the legislative history that may explain or elucidate it." *United States v. R.L.C.*, 503 U.S. 291, 298 (1992).

As this Court held in *Food & Drug Administration v. Brown and Williamson Tobacco Corporation*, 529 U.S. 120, 132 (2000):

> In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning – or ambiguity – of certain words or phrases may only become evident when placed in context. See Brown v. Gardner, 513 U.S. 115, 118 (1994) ('ambiguity is not a creature of definitional possibilities but of statutory context'). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." . . . Similarly, the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand.

Immigration and Naturalization Service v. Cardoza-Fonseca, 480 U.S. 421 (1987) is instructive. There, the Immigration and Naturalization Service ("INS") contended that an immigration statute which permitted a refugee to seek asylum if he had a "well-founded fear" of persecution and another statute which allowed an illegal immigrant to avoid deportation if he could show a "clear probability" that he would be subject to persecution established the same legal standard for use in assessing asylum applications and for making deportation avoidance decisions. Accordingly, it was argued, the standard of "clear probability" could be applied

by INS to all proceedings brought by an illegal alien or a refugee under either of the statutory provisions. The INS made arguments similar to those being made by the Secretary. First, the INS suggested that the differences in the two statutes were not sufficient to prevent the INS from imposing the more difficult standard of a "clear probability" on both proceedings. The Court disagreed:

> The Government argues, however, that even though the "well-founded fear" standard is applicable, there is no difference between it and the "would be threatened" test of § 243(h). It asks us to hold that the only way an applicant can demonstrate a "well-founded fear of persecution" is to prove a "clear probability of persecution." The statutory language does not lend itself to this reading.
>
> To begin with, the language Congress used to describe the two standards conveys very different meanings. *Id.* at 430

The Court continued:

> This ordinary and obvious meaning of the phrase is not to be lightly discounted. See Russello v. United States, 464 U.S. 16, 21 (1983); Ernst & Ernst v. Hochfelder, 425 U.S. 185, 198-199 (1976). With regard to this very statutory scheme, we have considered ourselves bound to "'assume "that the legislative purpose is expressed by the ordinary meaning of the words used."'" INS v. Phinpathya, 464 U.S. 183, 189 (1984) (quoting American Tobacco Co. v. Patterson, 456 U.S. 63, 68 (1982), in turn quoting Richards v. United States, 369 U.S. 1, 9 (1962)). *Id.* at 431.

In this case, the Secretary has consistently argued that the language of the 1994 statute is sufficiently flexible to embrace the language of the Secretary's 1995 formula. For the reasons shown in Part B., *supra,* that claim rings as hollow here as it did in *Cardoza-Fonseca*.

The *Cardoza-Fonseca* case also concludes that clear intent is expressed when Congress chooses different language or establishes different standards while adopting certain provisions from existing statutes.

> The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted § 208(a) and amended § 243(h). In doing so, Congress chose to maintain the old standard in § 243(h), but to incorporate a different standard in § 208(a). "'[Where] Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Russello v. United States, supra, at 23 (quoting United States v. Wong Kim Bo, 472 F.2d 720, 722 (CA5 1972)). The contrast between the language used in the two standards, and the fact that Congress used a new standard to define the term "refugee," certainly indicate that Congress intended the two standards to differ. *Id.* at 432

In the present case, Congress in 1994 adopted certain provisions from the Secretary's 1976 regulations but at the same time rejected the part of those regulations which required trimming the final field of LEAs (as to which the disparity test would be applied) based on a percentage of their pupil attendance numbers. As shown in Part B., *supra,* the

statutory formula does not permit the injection of that extraneous factor into the percentile calculation which must be based solely on per-pupil revenues.

When, as here, the words in a statute are undefined, the Congress is presumed to have intended they be given their "ordinary meaning." Their "ordinary meaning" can be supplied by dictionary definitions except where it is clear from "reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis" that some other meaning was intended. *Dolan v. U.S. Postal Service,* __ U.S. __, 126 S.Ct. 1252, 1257 (2006) (words "negligent transmission" in Federal Tort Claims Act exception to U.S. sovereign immunity waiver were properly given their "ordinary meaning" based on Webster's dictionary definition where nothing in statute suggested the Congress intended a different meaning); *accord, Rousey v. Jacowey,* 544 U.S. 320 (2005) (applying same rule to give words "on account of" in bankruptcy statute their "ordinary meaning" based on dictionary definition). Nothing in the 1994 statute or the circumstances warrants giving the word "percentile" anything other than its ordinary meaning. Doing so leaves no ambiguity in the statute on this point. The statute's plain language (and its sparse legislative history, *see, infra* at p.37,) leave no doubt that the statutory formula is different than the Secretary's formula. No argument from ambiguity can bridge that gap.

The historical context reveals that during the 1976 public notice-and-comment proceeding, two alternative methods for developing final fields of LEAs were debated – the percentile elimination of pupils and the opposing method of the direct percentile elimination of LEAs. These were mutually exclusive formulas. Congress' formula expressly mandates a formula which requires the percentile elimination of LEAs

based on per-pupil revenues. This left no room for further administrative action to adopt a different formula.

Moreover, the Secretary's formula produces an outcome plainly at odds with the intent of Congress that LEAs eligible to receive Impact Aid funds will actually receive and retain the benefit of those funds unless the statutory equalization test is met. Congress' intent on this point is crystal clear: "Section 8009 prohibits a State from taking Impact Aid payments into account in determining the amount of State aid to be paid to LEAs that receive Impact Aid, unless that State has an equalization plan approved by the Secretary and describes the standard which State plans must meet." House Report 103-425, 103rd Cong., 2nd Sess. (Feb. 16, 1994), p. 71. Section 8009 was later codified at 20 U.S.C. § 7709. *See*, *supra* at fn. 2. Using the Secretary's formula in place of the statutory formula deprives Petitioners (and other similarly situated LEAs) of the Impact Aid funds the Congress intended them to receive and permits this result though the statutory equalization test is not met.

F. THE SECRETARY'S FORMULA IS NOT ENTITLED TO *CHEVRON* DEFERENCE

Examining Congress' formula should end any further inquiry into Congress' intent. Congress' formula and not the Secretary's formula must be used in this equalization process. Petitioners further contend that traditional rules of statutory construction cement this conclusion. However, assuming for the sake of argument, that Congress' formula contains an ambiguity, the Secretary's purported interpretation is not deserving of any *Chevron* deference. Further, even with *Chevron* deference the Secretary's formula is not a "permissible" interpretation of Congress' formula.

This Court has "devoted a fair amount of attention lately to varying degrees of deference deserved by agency

pronouncements of different sorts, *see*, *United States v. Mead Corp.*, 533 U.S. 218 (2001); *Christensen v. Harris County*, 529 U.S. 576 (2000) . . . ." *General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. at 600.

Barnhart v. Walton, 535 U.S. 212, 217 (2002), in relying on *Chevron* stated "If, however, the statute 'is silent or ambiguous with respect to the specific issue,' we must sustain the Agency's interpretation if it is 'based on a permissible construction' of the Act." (*Citing*, *Chevron*, 467 U.S. at 843). To like effect is *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967, 125 S.Ct. 2688, 2702 (2005) where it was held that "[I]f the statute is ambiguous on the point, we defer . . . to the agency's interpretation so long as the construction is 'a reasonable policy choice for the agency to make'".

United States v. Mead, 553 U.S. 218, 226-227 (2001) however, identified two prerequisites to any *Chevron* deference.

> We hold that administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority. (Emphasis added)

Gonzales v. Oregon, ___ U.S. ___, 126 S.Ct. 904 (2006) (holding that Controlled Substances Act did not give the Attorney General authority to issue regulations prohibiting the use of controlled substances in assisted suicides authorized by State law) confirmed the holding in *Mead*: "*Chevron* deference, however, is not accorded merely because the statute is ambiguous and an administrative official is involved. To begin with, the rule must be promulgated pursuant to

authority Congress has delegated to the official. *Mead,* 533 U.S., at 226-227". *Gonzales*, at 916. Accordingly, to establish a right to *Chevron* deference the Secretary would have to show: (a) that the Congress in this case delegated to the Secretary the authority, either expressly or impliedly, to create or modify the statutory equalization formula pursuant to a rule "carrying the force of law" and (b) that the interpretation claiming deference was "promulgated in the exercise of that authority." (*Mead*, 553 U.S. at 226-227). The Secretary cannot satisfy either of these requirements.

1. THE CONGRESS DID NOT GIVE THE SECRETARY EXPRESS AUTHORITY TO ADOPT A DIFFERENT FORMULA

In *Gonzales*, the Attorney General issued an interpretive rule prohibiting the use of controlled substances to assist in suicides otherwise permitted under the Oregon Death With Dignity Act. The State of Oregon contended that the Attorney General lacked the authority to promulgate such an interpretive rule. The Attorney General first claimed that he had special authority to interpret certain provisions of the Controlled Substances Act because they were embodied in a regulation, relying on *Auer v. Robbins*, 519 U.S. 452, 461-463 (1997), which deferred to an agency interpreting its own regulations. The Supreme Court dismissed this contention as the regulation simply repeated or paraphrased the statutory provisions. Accordingly, the focus returned to what authority had been granted by Congress to the Attorney General to interpret this particular statute. This Court concluded that the Attorney General did not have such broad delegated authority.

> The idea that Congress gave the Attorney General such broad and unusual authority through an implicit delegation in the CSA's registration provision is not sustainable. 'Congress, we have held, does not alter

> the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants in mouseholes. . . ." *Id.* at 921.

The Attorney General's interpretive rule received no Chevron deference, but instead was given weight only to the extent it had the "power to persuade." *Id.* at 922. The Court found the Attorney General's interpretation to be unpersuasive.

In *Adams Fruit Company, Inc. v. Barrett*, 494 U.S. 638 (1990), the Department of Labor claimed authority to declare a federal worker's compensation law and its additional benefits to be preempted by state law. Since this preemption issue was not addressed by the federal legislation, the argument went, this caused a "gap" which the Secretary could fill. The Supreme Court disagreed:

> A precondition to deference under *Chevron* is a congressional delegation of administrative authority. Bowen v. Georgetown University Hospital, 488 U.S. 204, 208, 109 S. Ct. 468, 471, 102 L.Ed.2d 493 (1988). *See also*, *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123, 108 S. Ct. 113, 420-421, 98 L.Ed.2d 429 (1987) (*Chevron* review of agency interpretation of statutes applies only to regulations "promulgated pursuant to congressional authority") *Id.* at 494 U.S. at 649.
>
> Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental 'that an agency may not bootstrap itself into an area in which it has no jurisdiction.' *Id.* at 650.

In the present case, Congress spoke definitively. The Secretary had express authority prior to 1994 to create the equalization formula. He did so. In 1994, Congress enacted § 7709 establishing the statutory formula. That statute took away the Secretary's authority to issue or use any formula different from the statutory formula. While the Secretary has general rulemaking authority, the Secretary's legislative rulemaking authority to establish the equalization formula was eliminated. Congress does not expressly or impliedly delegate to an agency authority which it has expressly revoked. Congress' intent was clear: Federal Impact Aid money is intended to go to LEAs, not to go into State operational funding accounts unless the State can show that it has equalized its public school operational funding as measured by the statutory formula. *See,* § 7709 and legislative history quoted *supra* at p. 37. No interpretation at odds with that intent can be a permissible or reasonable interpretation of the statute. The Secretary had no authority to issue and has no authority to use the old formula.

2. THE SECRETARY HAS NO IMPLIED AUTHORITY TO ADOPT A DIFFERENT FORMULA.

The same arguments showing why the Secretary's claims of an express delegation of rulemaking authority must be rejected also show why the Secretary's claims of implied rulemaking authority over the equalization formula must be rejected.

National Cable and Telecommunications Association, 545 U.S. 967, 125 S.Ct. at 2699, concluded:

> In *Chevron*, this Court held that ambiguities in statutes within an agency's jurisdiction to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion. Filling these gaps,

> the Court explained, involves difficult policy choices that agencies are better equipped to make than courts. (*Citing*, *Chevron*, 467 U.S. 856-866.

Mead, 533 U.S. at 229 further developed the notion of implied delegation of authority (again citing *Chevron* at 467 U.S. at 842-845):

> This Court in *Chevron* recognized that Congress not only engages in express delegation of specific interpretive authority, but that '[s]ometimes the legislative delegation to an agency on a particular question is implicit.' 467 U.S., at 844. Congress, that is, may not have expressly delegated authority or responsibility to implement a particular provision or fill a particular gap. Yet it can still be apparent from the agency's generally conferred authority and other statutory circumstances that Congress would expect the agency to be able to speak with the force of law when it addresses ambiguity in the statute or fills a space in the enacted law, even one which 'Congress did not actually have an intent' as to a particular result. Id., at 845. When circumstances implying such an expectation exist, a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statutory ambiguity simply because the agency's chosen resolution seems unwise, see id. at 845-846 . . ., but is obliged to accept the agency's position if Congress has not previously spoken to the point issue and the agency's interpretation is reasonable. . . .

The 1994 statute did not leave a "gap" in the formula which the Secretary was authorized to fill. It removed from the Secretary the authority to develop the equalization formula and clearly provided for the two essential components of the

formula: the permissible percentile of disparity (25%) and the method for developing the final field of LEAs as to which that disparity determination must be made. Congress had no "expectations" that the Secretary would be filling any "gaps" in the equalization formula. It was legislatively enacted and complete. The Secretary's rule-making authority over the equalization formula was specifically removed.

3. SINCE THE SECRETARY'S FORMULA WAS NOT ISSUED IN EXERCISE OF RULEMAKING AUTHORITY IT IS NOT ENTITLED TO *CHEVRON* DEFERENCE

Even if an agency has been given rule-making authority to interpret a statute, the interpretation claiming deference must be promulgated "in the exercise of that [rule-making] authority." *U.S. v. Mead Corp.*, 533 U.S. at 226-227, 229. (Emphasis added). The Secretary did not promulgate the 1995 Appendix formula in the exercise of any rulemaking authority.

As noted earlier (Part D, *infra*), the Secretary in enacting the 1995 regulation exempted the promulgation process from the public notice-and-comment requirements of 5 U.S.C. § 553 and announced that no rule-making was occurring. Instead, the regulations "merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor revisions. Thus, the regulations do not establish or affect substantive policy." 60 F.R. 50778 (Pet. App. at 163a) (Emphasis added). The Secretary specifically rejected the notion that these regulations were being enacted as administrative rules "carrying the force of law." For that reason alone the Secretary's formula should be summarily rejected. At the very least, it is not entitled to *Chevron* deference.

It is also important to note that this is not a situation where Congress enacted new legislation and the Secretary subsequently promulgated clarifying, interpretive or gap filling regulations. The Appendix currently in force and upon which the Secretary relies is in substance and virtual form the same as his 1976 Appendix which Congress legislatively supplanted. It predated Congress' legislation by approximately 18 years. The Secretary did not promulgate a new rule, he merely hung on to an old one.

4. SINCE THE SECRETARY'S FORMULA IS INCONSISTENT WITH THE STATUTORY FORMULA IT CANNOT BE A PERMISSIBLE ADMINISTRATIVE INTERPRETATION OF THE STATUTE.

If an agency interpretation is not deserving of *Chevron* deference, "the weight of such judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gonzales*, at 922, *citing, Skidmore v. Swift & Co.*, 423 U.S. 134, 140 (1944) and referencing *Mead*, 433 U.S. at 235. *See, also, Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (". . . under *Skidmore* we follow an agency's rule only to the extent it is persuasive.").

The significance of according *Chevron* deference to an administrative interpretation is that if the agency's interpretation is permissible, it is to be followed by the Courts. Without *Chevron* deference, the Courts are free to decide which allowable interpretation prevails.

Even with full *Chevron* deference accorded an agency's interpretation, the interpretation must be based on a "permissible construction of the statute." *Chevron*, 467 U.S.

at 843; *Regions Hospital v. Shalala*, 522 U.S. 448, 457 (1998); *NLRB v. Food and Commercial Workers*, 484 U.S. 112, 123 (1987).

A permissible interpretation "reflects a plausible construction of the plain language of the statute and does not otherwise conflict with Congress' expressed intent." *Rust v. Sullivan*, 500 U.S. 173, 188-189 (1991) or is "rational and consistent with the statute" (*Pension Benefit Guaranty Corporation v. LTV Corporation, et al.*, 496 U.S. 633, 650 (1990).

Determining whether an interpretation is permissible involves an analysis of the purported statutory ambiguity and the options for resolution encompassed by the ambiguity itself. Accordingly, one is generally faced with only a few choices. In *Shalala*, the Court noted:

> We face these choices. Congress meant either for the Secretary to calculate future reimbursements using a figure emerging through regular NAPR review and the 3-year reopening window, or for the Secretary to use the figure recognized as reasonable at a later time, informed by a more careful assessment. 522 U.S. at 459

The Court in *Young v. Community Nutrition Institute*, 476 U.S. 974 (1986) also examined Congress' language to isolate the options for resolving statutory ambiguity. 476 U.S. at 980-981

Finally, in determining whether an interpretation is permissible, the courts also refer to the legislative history to further either identify or restrict the options: "The language of the statute and the legislative history can support either of the litigant's positions. . . . When we find, as we do here, that the legislative history is ambiguous and unenlightening on the matters with respect to which the regulations deal, we

customarily defer to the expertise of the agency." *Rust v. Sullivan*, *supra* at 185.

In this case, Congress removed from the Secretary the authority to craft the equalization formula. Congress tended to this process itself and developed a specific formula intended to achieve a specific outcome: to ensure that LEAs rather than States received the benefit of Federal Impact Aid funds unless State public school educational funding has been "equalized" under the Congress' statutory formula. Substitution of the Secretary's quite different formula prevents the achievement of this express Congressional purpose. Accordingly, it cannot stand. *See*, § 7709 and legislative history quoted *supra* at p. 37.

G. RESPONDENTS' OTHER POLICY ARGUMENTS CANNOT SALVAGE THE SECRETARY'S FORMULA

A primary argument presented throughout the course of these proceedings by Respondents is that the Secretary's formula (which eliminates LEAs based on pupil attendance numbers) is more statistically sound and produces fewer inequitable results than Congress' method requiring elimination of percentiles of LEAs based on per-pupil revenues. The short and conclusive answer is that once Congress has spoken, that ends the discussion. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, *supra; Pennsylvania v. Wheeling and Belmont Bridge Company*, *supra*. Policy arguments of this sort must be directed to the Congress, not to the courts. *Mobil Oil Corp. v. Higgenbotham*, 436 U.S. 618, 625(1978) ("There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. . . . we have no authority to substitute

our views for those expressed by Congress in a duly enacted statute.")

Further, the argument itself announces its own death. Stating that the Secretary's formula is better admits that it is different. If it is different, it cannot survive.

Respondents have also argued that allowing the intended beneficiaries of the Impact Aid to receive the Impact Aid without penalty will distort the New Mexico equalization funding formula at the expense of other school districts. This is not a legal argument. It is just another plea that this Court should condone the Secretary's substitution of his judgment for the Congress' judgment on policy issues. Moreover, the Impact Aid funding in New Mexico for fiscal year 2000 was approximately 2.7% of New Mexico's total operational budget for education. (Pet. App. at 234a-236a). More importantly, the statute at 20 U.S.C. §7709(b)(2)(B)(ii) and the current regulation at 34 C.F.R. §222.162(c)(2) allow a State to back out special funding associated with unique conditions found in certain LEAs to establish a base funding level. *See*, Pet. App. at 214a, 219a and 61a. Anomalies attributable to these special factors are removed. Even with this weighted funding backed out, in New Mexico the revenue per member for Mosquero was $6,520 (Pet. App. at 210a) 2.44 times greater than and the revenue per member for Des Moines of $2,672. (Pet. App. at 213a).

New Mexico is free to equalize its funding or not as it chooses. If New Mexico wants to have the benefits of achieving equalization, it must meet the 25% disparity test under the rules set by Congress. It has not done so. Thus, as shown above, the Secretary's formula is depriving Petitioners and other Impact Aid eligible LEAs in New Mexico of the federal funds the Congress intended them to receive. Those funds have in effect been diverted to the State's general

operational fund, contrary to the will of Congress. Petitioners have shown they were entitled to retain their Impact Aid funds for fiscal year 2000, and for all intervening years for which New Mexico was not equalized under the statutory formula.

CONCLUSION

The Secretary's Decision should be reversed, the Tenth Circuit's *En Banc* Opinion affirming the Secretary's equalization formula should be ruled inconsistent with the 1994 statute, and New Mexico's operational funding for fiscal year 2000 should be declared to not be equalized in accordance with the statutory equalization formula.

Respectfully submitted,

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In the Supreme Court of the United States

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PETITIONERS

v.

DEPARTMENT OF EDUCATION, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

The federal Impact Aid statute, 20 U.S.C. 7701 *et seq.*, provides funds to local school districts that have a substantial federal presence within the district. The Impact Aid program generally prohibits a State from considering federal impact aid funds received by local school districts when allocating state funds among school districts in the State. 20 U.S.C. 7709(a). If, however, the Secretary of Education certifies that the State's funding system is "equalize[d]" within the meaning of the statute, 20 U.S.C. 7709(b) (2000 & Supp. III 2003), the State may consider federal impact aid funds received by a school district when allocating state funds among school districts. The question presented is as follows:

Whether the methodology used by the Secretary in determining whether a State's funding system is equalized is based on a permissible interpretation of the Impact Aid statute, 20 U.S.C. 7709(b) (2000 & Supp. III 2003).

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OPINIONS BELOW

The per curiam opinion of the equally divided en banc court of appeals (Pet. App. 1a-2a) is reported at 437 F.3d 1289. The panel opinion of the court of appeals (Pet. App. 3a-33a) is reported at 393 F.3d 1158. The decision of the Secretary of Education (Pet. App. 34a-40a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 23, 2006. The petition for a writ of certiorari was filed on May 24, 2006, and was granted on September 26, 2006. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The pertinent statutory and regulatory provisions are set forth in an appendix to this brief. App., *infra*, 1a-8a.

STATEMENT

1. a. Congress established the Impact Aid program in 1950. 20 U.S.C. 7701 *et seq.*; Act of Sept. 30, 1950, ch. 1124, § 4(c)-(e), 64 Stat. 1106. The program provides federal funds to local school districts—or "local educational agencies" (LEAs), see 20 U.S.C. 7713(9)—to assist with the financial burdens of providing "educational services to federally connected children." 20 U.S.C. 7701. "Federally connected children" include children whose parents are in the military services or are civilian federal employees, children who reside on Indian lands or federal property, and children whose parents are employed on federal property. See 20 U.S.C. 7701(2)-(5). The Impact Aid program also provides funds to school districts whose property tax base is adversely affected by the federal government's tax-exempt ownership of real property in the districts. See 20 U.S.C. 7701(1).

As originally enacted, the Impact Aid law did not address whether a State, when allocating state educational funding among LEAs, could take into account the extent to which a particular LEA was the recipient of federal Impact Aid funds. In 1968, Congress specifically addressed that issue "in response to court decisions which held that some States, in considering the amount of impact aid payments received by a school district, and in deducting that amount from the district's State aid payment, were unfairly penalizing districts because of the existence of the Federal payments." S. Rep. No.

763, 93d Cong., 2d Sess. 55 (1974). Congress accordingly amended the Impact Aid statute to prohibit States from taking into account an LEA's receipt of Impact Aid funds when determining the allocation of state education funding among LEAs. See 20 U.S.C. 7709(a).

b. In the 1970s, an increasing number of States—often in response to legal challenges to their education funding systems—began revising their funding programs in an effort to reduce disparities and promote equalization in funding among school districts. See S. Rep. No. 763, *supra*, at 55; Staff of the House Comm. on Educ. and Labor, 93d Cong., 2d Sess., *Public Law 874 and State Equalization Plans: The Problems of the Legislative Prohibition of Section 5(d)(2)*, at 1, 12, 14 (Comm. Print 1974); GAO, *School Finance: State Efforts to Equalize Funding Gaps Between Wealthy and Poor Districts* 15, 21 (1998) (*1998 GAO Report*). In light of the "move by a number of jurisdictions to reform their school finance programs to assure equalization of educational expenditures," Congress became concerned that the "[i]nability to consider impact aid payments for the purposes of establishing an equalized level of expenditure seriously interfered with State plans for school finance reform." S. Rep. No. 763, *supra*, at 55; see H.R. Rep. No. 805, 93d Cong., 2d Sess. 42 (1974). Congress recognized that, when a State attempts to promote equalization of funding among LEAs, barring the State from considering impact aid to individual LEAs would impair the State's ability to advance its equalization objective. See *ibid.*

Congress therefore amended the Impact Aid statute to permit a State to take into account an LEA's receipt of funds under the program when allocating state funding if the "State has in effect a program of State aid that

equalizes expenditures for free public education among [LEAs] in the State." 20 U.S.C. 7709(b)(1). Congress left the task of formulating criteria for determining whether a State operates a qualifying equalization program to the discretion of the Secretary of Education. See 20 U.S.C. 240(d)(2)(B) (Supp. IV 1974) (providing that the term "equalize expenditures" would "be defined by the [Secretary] by regulation"). In 1976, after notice and comment, the Secretary promulgated regulations establishing the rules for determining whether a State has an effective equalization program such that it may consider Impact Aid funding when distributing state funds. See 41 Fed. Reg. 26,320, 26,327 (1976). Under those rules, a State would be considered "equalized" if the disparity in per-pupil expenditures or revenues among the State's LEAs was no more than 25%. *Ibid.*

In an appendix to the regulations, the Secretary set forth the methodology for applying the 25% disparity criterion. 41 Fed. Reg. at 26,329. First, the Secretary ranked the State's LEAs according to each LEA's per-pupil expenditures or revenues. *Ibid.* Next, the Secretary incorporated the number of pupils in each school district in order to identify the per-pupil expenditure or revenue for the LEA that serves the pupils at the 95th and 5th percentiles of all pupils in the State, as arrayed on a per-pupil revenue or expenditure basis. *Ibid.* Then, the Secretary compared the per-pupil expenditures or revenues of those two LEAs to determine whether the disparity exceeded 25%. *Ibid.* In short, as the Secretary explained, "[i]f there is a disparity of no more than 25 per cent in revenues per pupil * * * available to the 95th and 5th percentile school districts (those with the 95th and 5th percentiles of the total number of pupils after being ranked in order of revenue

per pupil), the program would be deemed to qualify" as equalized. *Id.* at 26,320.

The effect of comparing "the 95th and 5th percentile school districts" and incorporating the overall pupil populations into the calculus was essentially to exclude those LEAs whose pupil populations accounted for roughly that 5% of the overall pupil population in the State that lay at the far ends of the spectrum of per-pupil expenditures or revenues, and correspondingly to base the disparity calculation on the per-pupil expenditures or revenues associated with the central 90% of the overall pupil population along the spectrum. The Secretary explained that the "exclusion of the upper and bottom 5 percentile school districts is based upon the accepted principle of statistical evaluation that such percentiles usually represent unique or noncharacteristic situations." 41 Fed. Reg. at 26,320.

In the course of the notice and comment rulemaking process, the Secretary specifically rejected the suggestion (embraced by petitioners here) that the Secretary should not account for the number of pupils in each LEA, but should just compare the 95th and 5th percentiles of LEAs instead of the LEAs associated with the 95th and 5th percentiles of pupils. The Secretary accordingly prescribed that the "percentiles will be determined on the basis of numbers of pupils and not on the basis of numbers of districts." 41 Fed. Reg. at 26,324. The Secretary was concerned that, failing to account for the number of pupils in each school district could skew the calculation if, for example, very large LEAs—accounting for a significant percentage of the State's pupils—lay at each end of the spectrum. The Secretary explained:

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. * * * In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

Ibid. In 1993, the 1976 regulations and appendix were codified at 34 C.F.R. 222.63 (1993) and 34 C.F.R. Pt. 222, Subpt. K, App. (1993).

c. Until 1994, the methodology for determining whether a State operates an effective equalization standard was set forth exclusively in the regulations, with no statutory provisions addressing the matter. In connection with the periodic reauthorization of the Impact Aid program to take place that year, the Secretary submitted to Congress comprehensive proposed legislation to reauthorize the program. See S. 1513, 103d Cong., 1st Sess. (1993); H.R. 3130, 103d Cong., 1st Sess. (1993); see also S. Rep. No. 292, 103d Cong., 2d Sess. 56 (1994) (observing that "S. 1513 as introduced was a direct transmission from the Administration"). As one aspect of the Secretary's legislative proposal, the Secretary proposed language that would for the first time codify in the Impact Aid statute the standards for determining whether a State operates a qualifying equalization program.

The Secretary's proposal retained the 25% disparity standard set forth in the regulations, subject to the 95th

percentile exclusion. See S. 1513, *supra*, at 352 (proposed §8009(b)(2)(B)(i)); H.R. 3130, *supra*, at 352 (same). With particular respect to the 95th percentile exclusion, the Secretary's proposed language provided for "disregard[ing] [LEAs] with per-pupil expenditures or revenues above the 95th percentile of such expenditures or revenues in the State." *Ibid.* Congress enacted, without change, the language proposed by the Secretary. The sole change from the Secretary's proposal was to retain an exclusion at the bottom of the range for the 5th percentile. Congress, however, made no change with respect to the Secretary's language describing the *method* for determining which LEA falls at the 95th percentile (or the 5th percentile).[1]

As enacted, the 1994 amendment specifies that a State will be considered to operate a program that "equalizes expenditures among local educational agencies"—and thus will be permitted to consider federal Impact Aid funding when distributing State aid—if the "Secretary determines" and "certifies" that:

> the amount of per-pupil expenditures made by, or per-pupil revenues available to, the [LEA] in the State with the highest per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues avail-

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[1] The Secretary's proposal had retained the exclusion at the top of the range for the 95th percentile, but had not proposed retaining the corresponding exclusion at the bottom of the range. Cf. Richard G. Salmon, *The Measurement of Fiscal Equalization Pursuant to Federal Impact Aid, P.L. 81-874, Section 5(d)(2): Recommendations for Improvement*, 18 J. Educ. Fin. 18, 30 (1992) (suggesting that "there is no reason to exclude school districts from the analysis that incur low per-pupil costs").

> able to, the [LEA] in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. 7709(b)(1) and (2)(A). The statute then states, consistent with the language proposed by the Secretary, that "[i]n making [that] determination, * * * the Secretary shall—"

> disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.

20 U.S.C. 7709(b)(2)(B)(i).

In the wake of the 1994 amendments to the Impact Aid law, the Secretary issued new regulations. With respect to the 25% disparity standard and the 95th and 5th percentile exclusions, the regulations essentially mirrored the statutory language. See 34 C.F.R. 222.162(a). In particular, the regulations stated that a State will be considered to operate a program that "equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent." 34 C.F.R. 222.162. The regulations further provided that, "[i]n determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State." *Ibid.* In an appendix to the regulations, the Secretary set forth the precise methodology for applying the disparity test, which retained the same methodology for implementing the 95th and 5th percentile exclusions that had been outlined in the appendix to the previous regulations. See 34 C.F.R. Pt. 222, Subpt. K, App.

Those regulations have remained materially unchanged since they were promulgated.

2. a. For Fiscal Year 2000, pursuant to 20 U.S.C. 7709(b) and the associated regulations, the Assistant Secretary for Elementary and Secondary Education certified that New Mexico operated an equalized funding program. Pet. App. 41a-42a, 215a-221a. New Mexico, by mandate of state law, seeks to equalize education funding among its 89 LEAs. See N.M. Stat. Ann. §§ 22-8-1 *et seq.* (LexisNexis 1978); Pet. App. 196a-198a. New Mexico allocates its annual appropriation of state education funds among LEAs in a manner generally designed to result in each LEA's having roughly the same overall amount of per-pupil funding, with adjustments made for LEAs that have special funding demands. See Pet. App. 197a-198a, 218a.[2]

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[2] Although virtually all States attempt in some measure to ameliorate revenue disparities among school districts, see GAO, *State Efforts To Reduce Funding Gaps Between Poor and Wealthy Districts* 6-7 (1997), in recent years, only three States—New Mexico, Alaska, and Kansas—have sought and obtained the Secretary's certification that they operate an equalized funding program for purposes of the Impact Aid program. Certain States may choose not to seek certification because the State's LEAs receive modest amounts of Impact Aid funds, such that the State's distribution of state aid is not materially affected by whether it can take into account Impact Aid funding. In addition, the ability of a State to promote equalized funding may be affected by, *inter alia*, the extent to which funding of LEAs in the State is comprised of state aid as opposed to local revenues, and the degree to which the State elects to target state aid to offset disparities in local revenues. See *1998 GAO Report* 9-12. New Mexico's ability to achieve equalization rests in part on the fact that the share of LEA funding that comes from State aid (as opposed to local property tax revenues) is among the highest in the nation. See *id.* at 14 ("State contributions in the 1991-92 school year ranged from 8 percent of total (state and local) funding in New Hampshire to 85 percent of total funding in New Mexico.").

In determining that New Mexico satisfied the 25% disparity standard under the Impact Aid law, the Assistant Secretary explained that the per-pupil revenues for the LEA at the 95th percentile of all pupils "was $3,259.00 (Penasco) and the per-pupil revenue at the 5th percentile was [$]2,848.00 (Hobbs)." Pet. App. 220a; see *id.* at 210a-213a. The disparity between those two LEAs is 14.43%, within the 25% threshold. *Id.* at 220a.

b. Petitioners, two New Mexico LEAs that receive substantial Impact Aid funds, challenged the Assistant Secretary's certification.[3] Petitioners argued that New Mexico failed to qualify as equalized under the Impact Aid law, and that the State therefore was barred from taking into account petitioners' Impact Aid funding when allocating state funding among the State's LEAs. Petitioners argued, in particular, that if the 95th and 5th percentile of *LEAs*—rather than the LEAs serving the 95th and 5th percentile of *pupils*—were considered, New Mexico's system would not qualify as equalized. An administrative law judge (ALJ) sustained the Assistant Secretary's certification. Pet. App. 43a-58a.

Petitioners appealed the ALJ's decision to the Secretary, who affirmed the ALJ's decision. Pet. App. 34a-40a. The Secretary explained that, "[a]lthough the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific

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[3] Thirty of New Mexico's 89 LEAs received Impact Aid funds in fiscal year 2000. Pet. App. 234a-235a. The amount of Impact Aid funding received by an individual New Mexico LEA ranged from a low of $106 for one LEA to a high of almost $22.5 million for petitioner Gallup-McKinley County School District No. 1. *Ibid.* The Impact Aid funding received by petitioners' two LEAs amounts to almost one-half of the total Impact Aid funding received by all of the States' LEAs. See *ibid.*

implementation of the disparity test." *Id.* at 37a. Congress instead had "left that gap to be filled by regulation, which has been duly promulgated at an appendix to Subpart K of 34 CFR Part 222." *Ibid.* The Secretary concluded that there "is nothing within the text of the statute that precludes [the regulatory] interpretation or *requires* another result." *Id.* at 39a.

3. Petitioners sought judicial review of the Secretary's determination in the court of appeals under 20 U.S.C. 7711(b). Petitioners contended that the Secretary's methodology for determining which LEAs to exclude under the 95th and 5th percentile exclusions conflicts with the terms of the statute, 20 U.S.C. 7709(b)(2)(B)(i).

According to petitioners' argument, the statute precludes the Secretary from considering the number of pupils in each LEA when applying the 95th and 5th percentile exclusions. Instead, petitioners asserted, the statute compels the Secretary to eliminate 5% of the *LEAs* at each end of the spectrum of per-pupil expenditures or revenues, regardless of the number of pupils served by those LEAs. See Pet. App. 15a. That approach would call for eliminating five LEAs (or 5.6% of New Mexico's 89 LEAs) from each end of the spectrum. See *id.* at 15a n.7. Excluding five *LEAs* from each end of the range—instead of excluding LEAs until 5% of the *pupils* are accounted for, as the Secretary's methodology prescribes—would result in excluding LEAs that account for only 0.6% of the State's students at the bottom of the range and 1.2% of the State's students at the top of the range. See *id.* at 210a-213a; J.A. 89-92. In other words, rather than measuring equalization based on the LEAs serving 90% of the pupils in the State, petitioners' approach would measure it based on 98.2% of all

students. After excluding five LEAs from each end of the spectrum, the disparity in per-pupil revenues between the highest and lowest LEAs would be 26.93%, in excess of the 25% standard. Pet. App. 15a n.7.[4]

a. A panel of the court of appeals affirmed the Secretary's decision, rejecting petitioners' contention that the statute precludes the Secretary's methodology. Pet. App. 3a-33a. The panel reasoned that the "statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test," required that deference be accorded the Secretary's determination under *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837 (1984). Pet. App. 16a-17a.

The panel concluded that the Secretary's interpretation is reasonable, explaining: "Having already ranked the LEAs in descending order by their per-pupil expenditures, it makes sense that the cut-off points for percentiles would also be based on total student enrollment." Pet. App. 17a. The panel observed that the Secretary's "approach supports the basic purpose of the percentile exclusion because it eliminates in a fair and effective manner any unusual or noncharacteristic per-pupil revenues or expenditures that may appear at the extremes of the range of LEAs in the state." *Ibid.* The panel explained that petitioners' approach, by contrast, "would not further the goal of eliminating [the] unusual

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[4] Petitioners noted that 5% of New Mexico's 89 LEAs would fall somewhere between four and five LEAs: four LEAs would equal 4.5% of the 89 LEAs and five LEAs would equal 5.6% of the LEAs. Petitioners contended that five LEAs should be excluded under their approach. Pet. C.A. En Banc Reply Br. 4. The distinction is immaterial in this case as a practical matter, because exclusion of either four or five LEAs from each end of the spectrum would produce a disparity measure in excess of 25%.

distribution of per-pupil expenditures in New Mexico," which "has predominantly small LEAs, several of which rank near the top of per-pupil expenditures." *Ibid.*

Judge O'Brien dissented from the panel's disposition. Pet. App. 22a-23a. In his view, the statute unambiguously required a version of petitioners' methodology, under which the Secretary, as petitioners contended, was compelled to eliminate five LEAs from each end of the spectrum of per-pupil revenues. See *id.* at 24a.[5]

b. The court of appeals granted rehearing en banc and vacated the panel's opinion. The en banc court issued a per curiam opinion affirming the Secretary's de-

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[5] Petitioners explained below that Judge O'Brien's approach "followed the same process" as petitioners' approach of eliminating 5% of the LEAs—or five LEAs—from each end of the spectrum. Pet. C.A. En Banc Reply Br. 4; *id.* at 5 ("Both procedures essentially performed the same calculation."). Judge O'Brien, however, as an intermediate step, used the Microsoft Excel software program to calculate values for the 5th and 95th percentiles of per-pupil revenues, as applied to an array consisting of one per-pupil revenue figure for each of New Mexico's 89 LEAs. See Pet. App. 24a & n.11. He then excluded those LEAs whose per-pupil revenues fell below or above the values for the 5th and 95th percentiles as calculated by the software. The ultimate result was to exclude the same five LEAs from each end of the range as under petitioners' approach of excluding 5% of the LEAs. It appears that Judge O'Brien's approach generally would give rise to the same outcomes as petitioners' shorthand approach of arraying the LEAs and eliminating 5% of the LEAs from each end of the spectrum (but without the intermediate step of calculating a precise value for the 5th and 95th percentiles of per-pupil revenues). In this Court, petitioners continue to describe Judge O'Brien's approach as interchangeable with their own. See Pet. Br. 22-24. We therefore treat the approaches as equivalent, and they are clearly equivalent in the most relevant sense, in that they both look directly to the 95th and 5th percentile of LEAs, without accounting for the number of pupils served by an LEA. See pp. 21-24, *infra*.

cision by an equally divided court, but containing no further explanation or reasoning. Pet. App. 1a-2a.

SUMMARY OF ARGUMENT

The principal issue in this case is whether the Secretary's methodology for implementing the Impact Aid statute's equalization test is foreclosed by the statutory terms. The plain language of the statute readily encompasses the Secretary's methodology, and related statutory provisions support, and even explicitly endorse, that methodology.

A State funding program qualifies as equalized under the Impact Aid statute if the disparity in per-pupil revenues between the highest and lowest ranked LEA is less than 25%. If the statute focused only on the highest and lowest ranked LEAs, the issue in this case would not even arise. The statute further directs, however, that, in making that comparison, the Secretary must "disregard [LEAs] with per-pupil * * * revenues above the 95th percentile and below the 5th percentiles *of such* * * * *revenues in the State*." 20 U.S.C. 7709(b)(2)(B)(i) (emphasis added). The Secretary determines the 95th and 5th percentiles of "such" per-pupil "revenues in the State" by accounting for the number of pupils in the LEAs and identifying the per-pupil revenue figures associated with the 95th and 5th percentiles of the total pupil population in the State, and then excluding the LEAs with per-pupil revenues above the 95th percentile and below the 5th percentile.

Nothing in the terms of Section 7709(b)(2)(B)(i) compels the Secretary to ignore the number of pupils served by an LEA when applying the 95th and 5th percentile exclusions. Contrary to petitioner's argument, the statute does not speak in terms of identifying the 95th and

5th percentile "of LEAs." Rather, the statute calls for determining the 95th and 5th percentile "of [per-pupil] * * * revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). That language does not address the specific methodology for assembling the field of per-pupil revenue figures against which to identify the 95th and 5th percentile "of per-pupil revenues in the State." In particular, the language does not compel the Secretary to assign equal weight to each LEA's per-pupil revenue figure, regardless of the number of pupils served by an LEA. The statute therefore does not preclude the Secretary from applying the 95th and 5th percentile exclusions to focus on 90% of the pupils, as opposed to 90% of the LEAs.

The Secretary's emphasis on the number of pupils—rather than solely on the number of LEAs—is supported by the statutory focus on "per-pupil * * * revenues *in the State*" as a whole. 20 U.S.C. 7709(b)(2)(B)(i) (emphasis added). If a State were to divide an existing LEA into two LEAs for purely administrative purposes, with no effect on overall student population or the revenues allocated to those students, the administrative division would have no substantive effect on the amount or distribution of per-pupil revenues "in the State" as a whole. Yet petitioners' approach, because it focuses on the number of LEAs and assigns equal weight to every LEA, would *double* the weight assigned to the newly-divided LEA merely because it is now treated for administrative purposes as two LEAs rather than one.

In addition, petitioners' interpretation of Section 7709(b)(2)(B)(i) conflicts with Congress's approach in other provisions of the Impact Aid statute and in provisions governing related programs. The Impact Aid statute requires the Secretary to allocate Impact Aid funds to LEAs based on the number of pupils served by an

LEA. In that light, Congress presumably did not intend for the Secretary to ignore the number of pupils served by an LEA when determining whether funding is equalized among LEAs.

Congress made that clear in provisions governing the Education Finance Incentive Grant Program (EFIG), which was established in the same Act of Congress that enacted Section 7709(b)(2)(B)(i). Funding under EFIG is designed to promote equitable education financing by States, and is based in part on the extent of variation in per-pupil expenditures among a State's LEAs. Congress explicitly *required* the Secretary, when applying EFIG's formula for evaluating the degree of disparity in per-pupil revenues among a State's LEAs, to measure the variation based on the number of pupils served by an LEA. Congress should not be considered to have simultaneously *barred* the Secretary from conducting exactly that sort of pupil-based analysis when measuring the degree of variation among LEAs' per-pupil revenues under the Impact Aid statute.

EFIG also supports the Secretary's methodology in the Impact Aid regulations in an even more direct and explicit manner. Congress provided in EFIG that, if a State meets the disparity standard set forth in the Secretary's Impact Aid regulations—*i.e.*, the very methodology at issue in this case—the State would automatically receive a favorable rating for purposes of EFIG's measure of equity in per-pupil expenditures among the State's LEAs. Congress would not have explicitly incorporated in EFIG the methodology set forth in the Secretary's Impact Aid regulations if Congress, in the same Act, had intended to foreclose the Secretary from using that methodology in the Impact Aid program itself. In light of Congress's explicit endorsement of the Secre-

tary's methodology, there is no merit to petitioners' argument that the statutory history demonstrates an intent by Congress to reject that approach.

Petitioners' interpretation that the Secretary is barred from considering the number of pupils served by an LEA also is inconsistent with both Congress's general objectives in the equalization inquiry and the specific purpose of the 95th and 5th percentile exclusions. Barring the Secretary from taking into account an LEA's pupil population when applying those percentile exclusions could distort the analysis, either by failing to *ex*clude small LEAs with anomalous characteristics that do not materially affect the State's distribution of per-pupil revenues, or by failing to *in*clude large LEAs despite their significant effect on the State's per-pupil revenues. The uniform view of practitioners in the field of education finance thus is that a disparity test like the one in the Impact Aid statute must take into account the number of pupils served by an LEA. When considered in light of Congress's objectives in the equalization inquiry, accordingly, Section 7709(b)(2)(B)(i) should not—and need not—be read in the manner pressed by petitioners.

In addition, the Secretary's methodology applies a consistent approach across States without regard to idiosyncracies in the size or makeup of LEAs. In any State, the Secretary's methodology measures equalization by reference to 90% of the students in the State. Petitioners' approach, by contrast, would measure equalization based on 98.2% of all pupils in New Mexico (where the outlier LEAs are relatively small), but would measure it based on less than 90% of pupils in another State where outlier LEAs are relatively large. The Sec-

retary's uniform approach thus makes sense in administering a national program.

Because the statute does not foreclose the Secretary's methodology for purposes of the first step of the *Chevron* inquiry, the question under the second step is whether that methodology is reasonable. The Secretary's methodology readily satisfies that reasonableness standard. There is no merit to petitioners' suggestion that the Secretary's methodology fails to qualify for deference under *Chevron* in the first place. Congress directed the Secretary to make a determination whether a State has in effect a program that equalizes education expenditures, and Congress called for the Secretary to certify a State program that meets the statutory test. Congress plainly gave the Secretary authority to speak with binding force in carrying out those statutory responsibilities.

ARGUMENT

THE SECRETARY'S METHODOLOGY FOR DETERMINING WHETHER A STATE OPERATES AN EQUALIZED EDUCATION FUNDING PROGRAM IS CONSISTENT WITH THE TERMS OF THE STATUTE AND, INDEED, ADVANCES CONGRESS'S OBJECTIVES MORE EFFECTIVELY THAN PETITIONERS' FLAWED APPROACH

The validity of the Secretary's methodology for determining whether a State operates an equalized education funding program under 20 U.S.C. 7709 is governed by the two-step framework prescribed by *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842-843 (1984). Petitioners err in contending that the Secretary's approach is foreclosed at the first stage of the *Chevron* inquiry. The statute does not unambiguously—and counterintuitively—compel the Secretary to ignore the

number of pupils served by a State's LEAs when determining whether the State operates an equalized funding program. Rather, the Secretary's decision to consider the number of pupils served by the State's LEAs in determining which LEAs to exclude from the analysis is fully consistent with the statutory text, is supported by—indeed, explicitly endorsed by—related statutory provisions, and is substantially more effective in advancing the statutory objectives than petitioners' flawed approach. This Court therefore should sustain the Secretary's construction.

A. Congress Has Supported, Rather Than Foreclosed, The Secretary's Methodology

The threshold question under *Chevron* is whether "Congress has directly spoken to the precise question at issue," or whether the statute instead "is silent or ambiguous with respect to the specific issue." *Chevron*, 467 U.S. at 842-843. The question thus is whether "the statute unambiguously forecloses the agency's interpretation." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 125 S. Ct. 2688, 2700 (2005). Here, the statutory terms readily encompass the Secretary's methodology.

1. The Secretary's methodology is consistent with the plain language of the statute

The "precise question at issue" for purposes of *Chevron* step one, 467 U.S. at 842, is whether, when applying the 95th and 5th percentile exclusions set forth in the statute, 20 U.S.C. 7709(b)(2)(B)(i), the Secretary is required to eliminate 5% of the *LEAs* from each end of the spectrum of LEAs as ranked by per-pupil revenues, or instead may eliminate the outlying five percentiles of *pupils* as arrayed by per-pupil revenues. The terms of

the statute do not unambiguously address that question, much less "unambiguously foreclose" the Secretary's approach. *Brand X*, 125 S. Ct. at 2700.

a. The statute deems a State to have "in effect a program of State aid that equalizes expenditures" if "the amount of * * * per-pupil revenues available to [the LEA] in the State with the highest such * * * revenues did not exceed the amount" of "per-pupil revenues available to [the LEA] with the lowest such * * * revenues by more than 25 percent." 20 U.S.C. 7709(b)(1) and (2)(A).[6] If that provision—which appears to focus only on the top and bottom LEAs in the State—stood alone, the issue in this case would not arise. But the statute further provides, in the critical language at issue here, that when applying that 25% disparity standard, the Secretary must "disregard [LEAs] with per-pupil * * * revenues above the 95th percentile or below the 5th percentile of such [*i.e.*, per-pupil] revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). The pivotal question in this case is how to identify "the 95th percentile" and "the 5th percentile *of* * * * [*per-pupil*] *revenues in the State*." *Ibid.* (emphasis added).

Petitioners argue that the statute unambiguously requires the Secretary to exclude "the LEAs which fall above the 95th and below the 5th percentiles *of LEAs*," regardless of the number of pupils served by the excluded LEAs. Pet. Br. 22 (emphasis added). The statute, however, nowhere speaks in terms of determining the 95th and 5th percentiles "*of LEAs*." Rather, the

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[6] The statute allows for making that calculation based on either per-pupil expenditures or per-pupil revenues. See 20 U.S.C. 7709(b)(2)(A) and (B)(i). For ease of reference, and because the calculation for New Mexico is based on per-pupil revenues, we focus on per-pupil revenues rather than per-pupil expenditures.

statute calls for identifying the 95th and 5th percentiles "*of* * * * [*per-pupil*] *revenues* in the State." 20 U.S.C. 7709(b)(2)(B)(i) (emphasis added). Inasmuch as the statute focuses the analysis on "per-*pupil*" revenues, there is no basis for reading the text to preclude consideration of the number of "pupils" in an LEA when applying the 95th and 5th percentile exclusions. And nothing in the statute directs that determining the 95th and 5th percentiles "of [per-pupil] revenues in the State" must focus on the universe of *LEAs* in the State (without regard to the number of pupils), instead of focusing on the universe of *pupils* in the State. In other words, the 95th and 5th percentile LEAs are not the same as the LEAs with the 95th and 5th percentile pupils as arrayed by per-pupil revenues, and the statute does not unambiguously focus on the former.

In particular, the statute does not address whether, in assembling the field of per-pupil revenue figures against which to identify the 95th and 5th percentiles "of such * * * revenues in the State," 20 U.S.C. 7709(b)(2)(B)(i), the Secretary is required to compose an array consisting of one per-pupil revenue for each *LEA* (as petitioners evidently assume), or instead may compose an array consisting of one per-pupil revenue for each *pupil* in the State (as the Secretary's methodology effectively does). Neither of those approaches is unambiguously compelled (or foreclosed) by the text of 20 U.S.C. 7709(b)(2)(B)(i). That text simply requires, without further elaboration, determining the 95th and 5th percentiles "of [per-pupil] revenues in the State."

b. The difference between the two approaches, as applied to this case, is as follows. Both approaches begin by ranking the revenues of the State's LEAs, on a per-pupil basis, from lowest to highest. In this case,

that list would consist of 89 figures, with one entry for each LEA. Under petitioners' approach, the next step would entail identifying the per-pupil revenue associated with the LEAs that are 5% from each end. Petitioners, that is, attempt to identify the per-pupil revenue associated with the 95th and 5th percentiles of LEAs among the 89 LEAs along the spectrum. Petitioners would then assess whether the disparity in the per-pupil revenues of those two LEAs exceeds 25%.

The Secretary, by contrast, weights each LEA's per-pupil revenue figure by the number of pupils in that LEA. Under that approach, the list of per-pupil revenues consists not merely of one entry for each of the 89 LEAs (as under petitioners' approach), but instead effectively consists of one entry for each *pupil* in each LEA. The Secretary thus effectively arrays not just the 89 LEAs but the entire population of students in the State. The Secretary next eliminates 5% of those entries—or 5% of the overall pupil population—from each end of the spectrum. The remaining entry at the high and low end is the per-pupil revenue for the LEA that serves, respectively, the 95th and 5th percentile of pupils along the spectrum. The Secretary compares the per-pupil revenues of those two LEAs to determine whether it exceeds 25%.[7]

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[7] Petitioners suggest (Pet. Br. 19 n.6) that there is a fundamental difference between a "percentile" and a "percentage," and that it is thus inappropriate to equate (i) excluding 5% of the pupils from each end of the spectrum, with (ii) excluding pupils above and below the 95th and 5th percentiles of pupils along the spectrum. There is an obvious relationship between percentiles and percentages, however, such that those two inquiries are functionally similar. See Wilfred J. Dixon & Frank J. Massey, Jr., *Introduction to Statistical Analysis* 9 (4th ed. 1983) (explaining that "the 10th percentile * * * is defined as the value below which 10 percent of the distribution of values will fall").

The Secretary's methodology, no less than petitioners' approach, can readily be described as identifying the 95th and 5th percentiles "of [per-pupil] revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). Nothing in those terms directs that each and every LEA's per-pupil revenue figure must be assigned an equal weight in the array of per-pupil revenues, regardless of the relative number of pupils served by an LEA. The statute thus does not foreclose the Secretary's approach of weighting a particular LEA's per-pupil revenues by the number of pupils it serves, so as to reflect more accurately the relative contribution of that LEA's revenues to the overall revenues in the State. See Kern Alexander & Richard G. Salmon, *Public School Finance* 233 (1995) (explaining that it is "inappropriate[]," when assessing the extent to which education funding is equitably distributed, to "use local school districts as the unit of analysis, thus disregarding the differences in numbers of pupils served by local school districts," and that the analysis instead should "weight the school district proportionally to the number of pupils served").

In New Mexico, for instance, one LEA (Mosquera) serves 57 pupils, and another LEA (Albuquerque) serves over 83,000 pupils. Pet. App. 210a-211a. Petitioners' interpretation of the statute would give the same weight in the analysis to those two LEAs' per-pupil revenue figures, even though one LEA serves roughly 1500 pupils for every one pupil served by the other. The Secretary's methodology, by contrast, treats those LEAs not as functionally indistinguishable units but as representing distinct populations of *pupils*. That methodology therefore determines the 95th and 5th percentiles "of * * * [per-pupil] revenues in the State," 20 U.S.C. 7709(b)(2)(B)(i), by reference to which two LEAs' per-

pupil revenue figures represent the 95th and 5th percentiles of pupils in the State.

c. The textual focus on per-pupil revenues "in the State" as a whole, 20 U.S.C. 7709(b)(2)(B)(i), reinforces the conclusion that the statute does not compel the Secretary to apply the percentile exclusions without regard to the number of pupils served by each of the State's constituent LEAs. That is because that interpretation would attach dispositive significance to adjustments in the number of LEAs even when those adjustments could have no actual effect on the amount or distribution of per-pupil revenues "in the State" as a whole.

A State, for instance, might elect for purely administrative purposes to divide a large LEA into two LEAs, with no change in the total population of pupils served by the newly-divided LEA or in the funds allocated to that fixed population of pupils. The administrative division of the LEA therefore would have no substantive effect on the amount or distribution of per-pupil revenues "in the State." Petitioners' methodology, however, by focusing exclusively on the number of LEAs and attaching equivalent weight to each LEA, would *double* the weight given to the per-pupil revenues of the newly-divided LEA merely because it is now regarded as two LEAs rather than one. That purely administrative division thus could be determinative of whether the State is considered to have an equalized distribution of revenues, despite the absence of any substantive consequences for "per-pupil * * * revenues in the State." 20 U.S.C. 7709(b)(2)(B)(i). Congress should not be assumed to have intended—let alone unambiguously intended—that sort of anomalous outcome. See *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994) ("Some applications of respondents' position would produce results

that were not merely odd, but positively absurd * * *. We do not assume that Congress, in passing laws, intended such results.").

Moreover, the relevant provision directs the Secretary to ignore certain outlying LEAs in assessing whether per-pupil revenues in the State as a whole are equalized. In such an analysis, it makes sense to focus, as the Secretary's approach does, on the bulk of pupils in the middle and exclude 5% of the students at either extreme. By contrast, it would make little sense to exclude 5% of the LEAs, without regard to whether that represents only a small percentage of pupils (as in New Mexico because the outliers are small) or a significant percentage of the State's pupils (when the outliers are large). And it is possible that LEAs on one end may be large and LEAs on the other end may be small, which would further skew the analysis. The Secretary's approach ensures that, in every State, the degree of equalization of per-pupil revenues is measured by reference to the revenues associated with the 90% of pupils in the middle of the array.

d. Petitioners err in focusing their analysis of the text (Pet. Br. 16-18) on whether the term "percentile" is ambiguous. For the reasons explained, the relevant ambiguity does not concern the meaning of the term "percentile," but instead concerns the precise methodology for assembling the field "of [per-pupil] revenues in the State" against which to apply the 95th and 5th percentile exclusions. 20 U.S.C. 7709(b)(2)(B)(i).[8] Petitioners' ap-

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[8] The point is not that the term percentile is ambiguous, but that it begs the question—percentiles of what? The statute does not, as petitioners would have it, specify percentiles of the LEAs. Rather, it addresses percentiles of per-pupil revenues. In arraying the observations of per-pupil revenues, it could be possible to array observations

proach calls for identifying the 95th and 5th percentile of LEAs in a field of 89 observations consisting of one per-pupil revenue figure for each LEA. The Secretary's methodology weights each LEA's per-pupil revenue figure by the LEA's pupil population and assembles an array of observations that includes every pupil in the State. The terms of Section 7709(b)(2)(B)(i) do not foreclose the latter approach any more than they foreclose the former one. See *Graham County Soil & Water Conservation Dist.* v. *United States*, 545 U.S. 409, 419 n.2 (2005) (statute "is ambiguous because its text, literally read, admits of two possible interpretations").[9]

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only of LEAs or to array observations of pupils. Because the statute ultimately is concerned about measuring disparity among revenues for *pupils* across a State and more broadly about educating *pupils*, it is reasonable for the Secretary to choose the latter approach.

[9] When the case was before the court of appeals' panel, petitioner Zuni argued that the Secretary, as an alternative approach to eliminating 5% of the LEAs from each end of the spectrum, could calculate 95% of the per-pupil revenues for the LEA with the highest such revenues and eliminate any LEA whose per-pupil revenues exceeded that amount, and also apply a corresponding exclusion at the low end of the spectrum. See Pet. App. 15a. (Petitioner Gallup-McKinley made no challenge to the Secretary's methodology at the panel stage below, but instead made an unrelated argument based on a separate statutory provision. See *id.* at 19a-22a.) Although petitioners largely avoid reiterating that alternative approach in this Court, at one point petitioners describe that alternative as "precisely what the statute requires." Pet. Br. 26 (discussing method that entails applying 95th and 5th percentile exclusions "to the revenues per membership of the highest and lowest LEAs in the State and then excluding LEAs with per-pupil revenues above or below the product of those calculations"). That methodology does confuse percentiles with percentages, cf. note 7, *supra*, and gives rise to substantially different results than the alternative of eliminating 5% of the LEAs from each end of the spectrum. See Pet. App. 15a n.7.

2. *Petitioner's interpretation of the statute conflicts with Congress's approach in related provisions*

This Court has instructed that, "[i]n determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation." *FDA* v. *Brown & Wiiliamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). Here, petitioners' view that the statute forecloses the Secretary from considering the number of pupils served by an LEA is irreconcilable with Congress's approach in related statutory provisions. See *Household Credit Servs., Inc.* v. *Pfennig*, 541 U.S. 232, 241 (2004) (conducting "examination of [the statute's] related provisions" as part of *Chevron* step-one inquiry).

a. The Impact Aid statute prescribes that, in establishing the amount of Impact Aid funds to be provided to any LEA, the Secretary is required to "determine the number of children who were in average daily attendance in the schools of such agency," and then to determine the number of those pupils who have the requisite federal connections. 20 U.S.C. 7703(a)(1). The statute therefore does not treat each recipient LEA as an equivalent entity, but instead bases an LEA's level of Impact Aid funding on the number of pupils it serves. That understanding that LEAs are not interchangeable units but instead serve distinct populations of *pupils* necessarily informs the proper interpretation of the Impact Aid statute's equalization test. Congress did not require the Secretary to allocate Impact Aid funds *to* LEAs based on the number of pupils they serve, while simultaneously requiring the Secretary to assess whether fund-

ing is equalized *among* LEAs with no consideration of the number of pupils they serve.

In describing the operation of the 25% disparity test, moreover, the Impact Aid statute not only requires the Secretary to "disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State," 20 U.S.C. 7709(b)(2)(B)(i), but it also requires the Secretary to "take into account the extent to which a program of State aid reflects the additional cost of providing free public education * * * to *particular types of students*, such as children with disabilities," 20 U.S.C. 7709(b)(2)(B)(ii) (emphasis added). Congress's recognition that an LEA's per-pupil revenue amount alone might fail to account for the costs of educating "particular types of students" reinforces the conclusion that the relative significance of the per-pupil revenues of LEAs can only be considered in the context of the individual pupils served by those LEAs. That context is informed by variations in the number of pupils served by each LEA no less than variations in the "particular types of students" served by each LEA.

b. Any doubt about the permissibility of the Secretary's interpretation, however, is removed by related provisions enacted in 1994 in the same Act of Congress that enacted the Impact Aid provisions at issue here. In that Act, Congress also established a new Education Finance Incentive Grant Program (EFIG), now codified at 20 U.S.C. 6337 (Supp. III 2003). See Improving America's Schools Act of 1994, Pub. L. No. 103-382, Tit. I, § 101, 108 Stat. 3575. That program is designed to promote equitable education funding by States. Grants to States under EFIG are based on an "equity factor," which—like the equalization test in the Impact Aid

statute—aims to measure the degree of variation in per-pupil expenditures among a State's LEAs. 20 U.S.C. 6337(b)(3) (Supp. III 2003).[10]

In assessing the disparity in per-pupil expenditures among LEAs for purposes of EFIG's equity factor, Congress required calculation of a "coefficient of variation for the per-pupil expenditures of local educational agencies," 20 U.S.C. 6337(b)(3)(A)(ii)(I) (Supp. III 2003), which, like the 25% disparity test in the Impact Aid statute, is one method of measuring the degree of variation among per-pupil expenditures in a State. See *Public School Finance* 236 (describing both approaches). Of particular relevance here, Congress directed that, in applying that measure, "the Secretary shall weigh the variation between per-pupil expenditures in each [LEA] * * * *according to the number of pupils served by the* [*LEA*]." 20 U.S.C. 6337(b)(3)(A)(ii)(II) (Supp. III 2003) (emphasis added). Given that Congress compelled the Secretary to consider an LEA's number of pupils when assessing the disparity among per-pupil expenditures for purposes of EFIG, it would require much clearer language than the terms of Section 7709(b)(2)(B)(i) to conclude that Congress compelled the Secretary to ignore an LEA's number of pupils when assessing the disparity among per-pupil expenditures for purposes of the Impact Aid program. That is particularly the case because the two sets of provisions were enacted by the same Act of Congress and serve the same function.

What is more, Congress went further in the provisions of EFIG and *explicitly* endorsed the Secretary's methodology for applying the disparity test under the

[10] In addition to the equity factor, the level of funding also turns on an "effort factor," which measures the extent to which a State uses available resources to fund education. 20 U.S.C. 6337(b)(2) (Supp. III 2003).

Impact Aid program. Congress provided in EFIG that a State "that meets the disparity standard described in section 222.63 of title 34, Code of Federal Regulations (as such section was in effect on the day preceding October 10, 1994)"—*i.e.*, a State that qualifies as equalized under the Secretary's methodology in the Impact Aid regulations—would automatically be granted a favorable equity rating for purposes of EFIG. 20 U.S.C. 6336(b)(3)(B) (1994).[11] Congress cannot be considered to have explicitly endorsed the Secretary's Impact Aid methodology by essentially incorporating it into the provisions of EFIG, but to have simultaneously—in the same enactment—implicitly prohibited that same methodology under the Impact Aid program itself.

Finally, after the Secretary promulgated new Impact Aid regulations in the wake of the 1994 statute, in which he re-issued the methodology for implementing the disparity standard but under a different code section (*i.e.*, 34 C.F.R. 222.162), Congress once again demonstrated its endorsement of the Secretary's methodology by enacting an amendment to make a corresponding adjustment in the terms of EFIG. See 20 U.S.C. 6337(b)(3)(B) (Supp. III 2003) (referring to "the disparity standard described in section 222.162 of title 34, Code of Federal Regulations") (enacted by the No Child Left Behind Act of 2001, Pub. L. No. 107-110, § 101, 115 Stat. 1527).

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[11] The Conference Report specifically observed that the favorable equity rating would apply "[i]f a State meets the expenditure disparity standard under the Impact Aid program regulations (currently Alaska, Kansas and *New Mexico*)." H.R. Conf. Rep. No. 761, 103d Cong., 2d Sess. 639 (1994) (emphasis added).

3. Petitioners' interpretation of the statute is inconsistent with Congress's objectives

As the Court has explained, "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); see *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997) (explaining that the "ambiguity of statutory language is determined" not only "by reference to the language itself," but also by reference to "the specific context in which that language is used, and the broader context of the statute as a whole"). Here, the broader statutory objective is to determine whether a State funding program equalizes the distribution of per-pupil revenues across the State, and the specific purpose of the 95th and 5th percentile exclusions is to eliminate anomalous characteristics of outlying observations at the extremes of the range that could distort the analysis.

a. Petitioners' interpretation that the Secretary is barred from considering the number of pupils served by each LEA stands at cross purposes with the object of the percentile exclusions. For precisely that reason, the Secretary rejected a methodology that would exclude a specific number (or percentile) of LEAs without considering the number of students served by those LEAs:

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among the States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might

> exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. 26,324 (1976).

For instance, if a State has a number of small LEAs ranking at the top and bottom of the range of per-pupil revenues—as is the case in New Mexico, see pp. 11-12, *supra*—eliminating only 5% of the LEAs could exaggerate the degree of disparity actually experienced by the lion's share of pupils in the State. Congress's objective was to eliminate outlying observations and focus the analysis on the degree of disparity experienced by the bulk (*i.e.*, the middle 90%) of students in the State.[12]

As an example, if the 5% of LEAs that are excluded under petitioner's approach together with the LEAs at each end of the remaining spectrum account for less than one percent of the overall pupil population, the State might fail the 25% disparity test, and thus be deemed non-equalized, even though it has achieved equalized funding with respect to 99% of its pupils and 99% of its overall per-pupil revenues. And in such a situation, the small districts at the ends of the remaining

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[12] The number of pupils served by a particular LEA varies widely among and within individual States, and a substantial number of LEAs serve a very small pupil population. In New Mexico itself, for instance, the number of pupils served by any one school district is as small as 57 pupils and as large as more than 83,000 pupils. See Pet. App. 210a-211a; see also *Public School Finance* 233 (noting that "Ohio maintains three island districts, [with] each district enrolling no more than six pupils," and observing that Virginia has school districts that serve from 350 to 135,000 pupils each).

range that would be responsible for the determination that the State fails the 25% disparity test are especially likely to display the sorts of anomalous characteristics that should exclude them from the analysis. See *Public School Finance* 233 ("states occasionally experience exceptionally high per-pupil costs to provide educational services for limited numbers of pupils").

Conversely, when a State's highest (or lowest) LEAs in terms of per-pupil revenues serve disproportionately *large* numbers of pupils, excluding 5% *of the LEAs* from each end of the range—without regard to the number of pupils excluded thereby—could give a false impression that the State operates an effective equalization program. For instance, if the LEAs comprising the highest and lowest 5% of the range of per-pupil revenues consist of large LEAs accounting for a majority of the pupils in the State, the State could be deemed equalized based on the remaining LEAs even if there were substantial disparities in per-pupil revenues for a majority of the State's pupils.[13]

Moreover, as the Secretary emphasized, differences in the relative sizes of outlying LEAs can vary across States, such that the disparity standard, under petitioners' approach, would be applied "in an unfair and inconsistent manner among the States." 41 Fed. Reg. at 26,324. In a national program, it only makes sense to adopt a standard that in every State focuses on the question whether the bulk of students—the same 90% of students in the middle—suffer from disparities in education financing. For those reasons, the ineffectiveness of peti-

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[13] In New Mexico, roughly 10% of the State's LEAs (or nine of the 89 LEAs)—*i.e.*, Albuquerque, Las Cruces, Gallup-McKinley, Gadsen, Farmington, Roswell, Clovis, Rio Rancho, and Hobbs—account for over 56% of the State's pupils. See Pet. App. 210a-213a; J.A. 89-92.

tioners' approach in advancing the statutory objectives counsels strongly against reading 20 U.S.C. 7709(b)(2)(B)(i) to compel that result.

b. The anomalies produced by petitioners' interpretation also explain the uniform view of practitioners in the field of education finance that an equalization test like that prescribed by Section 7709(b)(2)(B) must consider the number of pupils associated with a particular school district's per-pupil revenues, rather than simply give equal weight to every school district's per-pupil revenue amount. In the administrative proceedings in this case, a leading authority in the field accordingly explained: "It is the practice in the field in using tests of this kind to exclude the segments of the student population at the margins of the ranking so as to avoid having their per-pupil input (i.e., expenditure or revenue) falsely overstate disparities." J.A. 5 para. 6. As a result, the Secretary's approach is "methodologically sound" in "excluding LEAs in the ranking that fell above or below the 95th and 5th percentiles of the total number of students in the State." J.A. 4-6 para. 7. By contrast, that leading authority explained, petitioners' approach of excluding "the top and bottom 5 percentiles of expenditures or revenues per pupil in lieu of pupils" is "inappropriate," because that "method would not prevent the problem of false disparities" and would "render the test ineffective to gauge whether a State's program is achieving equity." J.A. 6-7 para. 10.

Petitioners do not dispute that the Secretary's methodology reflects the accepted practice in the field.[14]

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[14] See, *e.g.*, *Public School Finance* 233 ("The *unit of analysis* should be based upon pupils and not the local school district," because the focus in "equity analysis * * * should be on pupils served throughout the state and not on the administrative structure that serves only as a

Congress should not be assumed to have compelled the Secretary to abandon a methodology universally endorsed by experts in the field and to adopt an approach uniformly regarded by them as deficient.[15]

4. The statutory history demonstrates that Congress endorsed the Secretary's methodology

Petitioners argue (Pet. Br. 6-15, 24-25) that the "legislative and regulatory history" of Section 7709(b)(2)(B)(i) indicates an unambiguous intention of Congress to preclude the Secretary from considering an LEA's number of pupils when applying the 95th and 5th percentile exclusions. The terms of that provision do not specifically resolve the matter, however, and related statutory provisions affirmatively support the Secre-

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vehicle for delivery of educational services. In the case of Virginia, by treating school districts as the unit of analysis, Highland County Public Schools, serving approximately 350 pupils, would exert an identical statistical influence as Fairfax County, serving approximately 135,000 pupils."); Allan R. Odden & Lawrence O. Picus, *School Finance: A Policy Perspective* 50 (2d ed. 2000) ("A statistical solution is to 'weight' the district or site measure by the number of students," because "[i]f this statistical weighting is not done, each district regardless of size is treated as one observation. Thus, in New York state for example, New York City with a million students and about one-third of all students in the state would affect the statistical findings exactly as much as would a small, rural district with only 100 students. This simply does not make sense."); Robert Berne & Leanna Stiefel, *The Measurement of Equity in School Finance: Conceptual, Methodological, and Empirical Dimensions* 59 (1984) (explaining that "pupil unit of analysis predominates" over "district unit of analysis," and "it seems to us that each pupil should receive equal weight regardless of the size of the district in which she or he is enrolled").

[15] Cf. 20 U.S.C. 6336(3)(C) (2000) ("Secretary may revise each State's equity factor as necessary based on the advice of independent education finance scholars").

tary's approach, which should be decisive for purposes of taking the analysis past *Chevron*'s first step. Petitioners, in any event, draw precisely the wrong inferences from that history.

Petitioners assume that, when Congress enacted Section 7709(b)(2)(B)(i) in 1994, Congress rejected the methodology that had been set forth in the Secretary's regulations since 1976. Petitioners' argument is grounded in the fact that the language of the regulations made explicit that the application of the 95th and 5th percentile exclusions turned on the number of pupils, whereas the language of the statute does not speak directly to that issue. Compare 20 U.S.C. 7709(b)(2)(B)(i) (referring to 95th and 5th percentiles "of such [per-pupil] expenditures or revenues in the State"), with 34 C.F.R. Pt. 222, Subpt. K, App. (1993) (referring to "the 95th and 5th percentiles of the total number of pupils in attendance" in the State's LEAs). The *ambiguity* in Section 7709(b)(2)(B)(i), however, could hardly be viewed as an *unambiguous* rejection of the Secretary's longstanding methodology. Cf. *Green* v. *Bock Laundry Mach. Co.*, 490 U.S. 504, 521 (1989) ("A party contending that legislative action changed settled law has the burden of showing that the legislature intended such a change.").

That the provision cannot be read as an implicit rejection of the Secretary's approach is especially clear given that the Secretary himself proposed the relevant language, as part of his proposed legislation to reauthorize the Impact Aid program. See pp. 6-7, *supra*. The Secretary of course gave no indication that he viewed his own proposal to constrain his ability to continue the agency's consistent approach of almost two decades and to require him instead to use a methodology

he had long since rejected as unsound and inequitable. And Congress gave no indication that it viewed the Secretary's proposal to have that disruptive effect. Cf. *Miller* v. *Youakim*, 440 U.S. 125, 144 (1979) ("Administrative interpretations are especially persuasive where, as here, the agency participated in developing the provision."). The Secretary's actions following the enactment of the language he proposed confirm that no change was intended. The Secretary promulgated new regulations generally implementing the reauthorization legislation, but retained, essentially without change, the previous regulations concerning application of the 25% disparity test and the 95th and 5th percentile exclusions. See 34 C.F.R. 222.162(a); 34 C.F.R. Pt. 222, Subpt. K. App.

Finally, any suggestion that Congress somehow intended to disapprove of the Secretary's methodology when it enacted the Secretary's own proposal is conclusively refuted by the fact that, in the same Act in which it enacted the Secretary's proposal, Congress also explicitly incorporated and endorsed the Secretary's methodology in the provisions establishing EFIG. See pp. 29-30, *supra*. In that light, the legislative and regulatory history relied on by petitioners, far from showing a clear intention to reject the Secretary's methodology, in fact demonstrates an intention to preserve it.

B. The Secretary's Methodology Is Based On A Reasonable Construction Of The Statute

Because the statute, for purposes of the first step of the *Chevron* framework, contains no unambiguous prohibition against considering the number of pupils in an LEA when applying the 95th and 5th percentile exclusions, the question under the second step of *Chevron* is whether the Secretary's methodology rests on a reason-

able construction of the statute. See *Chevron*, 467 U.S. at 844. Petitioners understandably devote the bulk of their attention to the question whether the statute unambiguously precludes the Secretary's approach. There could be no serious question that, insofar as it is permitted by the statutory terms, the Secretary's methodology amply qualifies as a "reasonable policy choice for the [agency] to make." *Brand X*, 125 S. Ct. at 2708 (quoting *Chevron*, 467 U.S. at 845).

As the Secretary explained when initially establishing the methodology in 1976, that approach facilitates a sound analysis of whether a State's education funding is equalized by eliminating anomalous characteristics that may lie at the extremes of the range of per-pupil expenditures. 41 Fed. Reg. at 26,324. The approach is substantially superior to petitioners' competing methodology in all the respects previously explained, and it has been applied consistently for a period of three decades. See *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740 (1996) ("[A]gency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist."). In addition, the methodology addresses a quintessentially "technical" and "complex" subject matter of the kind ordinarily left to the agency's expertise. *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 339 (2002). In short, the Secretary's methodology not only is reasonable, but is far sounder than petitioners' approach as a means to fulfill the Secretary's responsibility to determine whether a "State has in effect a program of State aid that equalizes expenditures for free public education among [LEAs] in the State." 20 U.S.C. 7709(b)(1).

C. The Secretary's Regulations Are Entitled To Deference Under The *Chevron* Framework

While petitioners principally argue that the Secretary's regulation is inconsistent with the text of the statute for purposes of the first step of *Chevron*, petitioners also suggest that the Secretary's regulations do not warrant consideration under the *Chevron* framework in the first place. Pet. Br. 37-44. In the court of appeals, however, petitioners affirmatively "agree[d] that the analysis of this case begins with *Chevron*." C.A. En Banc Pet. 3. Petitioners, in any event, are fundamentally mistaken in contending that *Chevron* does not apply in this case.

Petitioners appear to argue that Congress did not confer authority on the Secretary to adopt binding rules concerning administration of the Impact Aid statute's equalization test. Insofar as petitioners' contention is that the Secretary's methodology falls outside the scope of her authority because it is foreclosed by the statute, see, *e.g.*, Pet. Br. 41, the argument collapses into petitioners' (erroneous) arguments concerning step one of the *Chevron* framework. To the extent petitioners suggest more broadly that the Secretary lacks authority to act with binding force in administering the equalization inquiry, petitioners are wrong.

The statute explicitly directs the Secretary to "mak[e] a determination," 20 U.S.C. 7709(b)(2)(B), of whether a "State has in effect a program of State aid that equalizes expenditures," 20 U.S.C. 7709(b)(1), and to "certify the program" if "the Secretary determines that a program of State aid qualifies" as equalized, 20 U.S.C. 7709(c)(3)(A). Those provisions plainly provide for the Secretary to speak with authoritative force in carrying out her statutory responsibilities. See 20

U.S.C. 7709(d)(2) (prohibiting the State from taking Impact Aid payments into consideration until the Secretary certifies the State's program); see also 20 U.S.C. 1221e-3 ("The Secretary, in order to carry out functions otherwise vested in the Secretary by law or by delegation of authority pursuant to law, * * * is authorized to make, promulgate, issue, rescind, and amend rules and regulations governing the manner of operation of, and governing the applicable programs administered by, the Department."); 20 U.S.C. 3474.

Petitioners fare no better in contending (Pet. Br. 43-44) that the Secretary's determination should be denied *Chevron* deference because the regulations embodying the Secretary's methodology, when issued in 1995, were not promulgated pursuant to notice-and-comment procedures. As petitioners themselves explain (Pet. Br. 13-15, 44), those regulations were essentially a re-issuance of regulations that had initially been promulgated in 1976, and those preexisting regulations were issued through notice-and-comment procedures, see 41 Fed. Reg. at 26,320, 26,329; see also 60 Fed. Reg. 50,778 (1995) (explaining that 1995 "regulations do not establish or affect substantive policy"). And even in the normal course, when there is no such preexisting notice-and-comment regulation, the Court has made clear that "deference under *Chevron* * * * does not necessarily require an agency's exercise of express notice-and-comment rulemaking power." *Edelman* v. *Lynchburg Coll.*, 535 U.S. 106, 114 (2002).

In addition, even if there were any doubt about the deference owed to the regulations, the administrative action under review in this case is not the issuance of the 1995 regulations as such, but instead is the formal decision by the Secretary concluding that New Mexico is

entitled to certification of its equalization program under 20 U.S.C. 7709(c)(3). Pet. App. 34a-40a. The Secretary authoritatively determined in that decision that the methodology set forth in the regulations is an appropriate interpretation of the statute and that New Mexico was entitled to certification under the statute. See *id.* at 38a (concluding that "New Mexico's program [c]omplied with the statutory requirements"); *id.* at 40a ("[T]hose regulations are consist[e]nt with the statutory provision they implement."). That formal determination by the Secretary is fully entitled to treatment under the *Chevron* framework.

Finally, in the circumstances of this case, any question concerning whether the Secretary's methodology is entitled to be judged for reasonableness under *Chevron* is largely an academic one. Insofar as the statute does not foreclose the Secretary's methodology, her construction is not merely a reasonable one, but a plainly superior one.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. 20 U.S.C. 6337 provides, in pertinent part:

§ 6337. Education finance incentive grant program

(a) Grants

From funds appropriated under subsection (f) of this section the Secretary is authorized to make grants to States, from allotments under subsection (b) of this section, to carry out the programs and activities of this part.

(b) Distribution based upon fiscal effort and equity

* * * * *

(3) Equity factor

(A) Determination

(i) In general

Except as provided in subparagraph (B), the Secretary shall determine the equity factor under this section for each State in accordance with clause (ii).

(ii) Computation

(I) In general

For each State, the Secretary shall compute a weighted coefficient of variation for the per-pupil expenditures of local educational agencies in accordance with subclauses (II), (III), and (IV).

(II) Variation

In computing coefficients of variation, the Secretary shall weigh the variation between per-pupil expenditures in each local educational agency and the average per-pupil expenditures in the State according to the number of pupils served by the local educational agency.

* * * * *

(B) Special rule

The equity factor for a State that meets the disparity standard described in section 222.162 of title 34, Code of Federal Regulations (as such section was in effect on the date preceding January 8, 2002) or a State with only one local educational agency shall be not greater than 0.10.

* * * * *

2. 20 U.S.C. 7709 provides, in pertinent part:

§ 7709. State consideration of payments in providing State aid

(a) General prohibition

Except as provided in subsection (b) of this section, a State may not—

(1) consider payments under this subchapter in determining for any fiscal year—

(A) the eligibility of a local educational agency for State aid for free public education; or

(B) the amount of such aid; or

(2) make such aid available to local educational agencies in a manner that results in less State aid to any local educational agency that is eligible for such payment than such agency would receive if such agency were not so eligible.

(b) State equalization plans

(1) In general

A State may reduce State aid to a local educational agency that receives a payment under section 7702 or 7703(b) of this title (except the amount calculated in excess of 1.0 under section 7703(a)(2)(B) of this title and, with respect to a local educational agency that receives a payment under section 7703(b)(2) of this title, the amount in excess of the amount that the agency would receive if the agency were deemed to be an agency eligible to receive a payment under section 7703(b)(1) of this title and not section 7703(b)(2) of this title) for any fiscal year if the Secretary determines, and certifies under subsection (c)(3)(A) of this section, that the State has in effect a program of State aid that equalizes expenditures for free public education among local educational agencies in the State.

(2) Computation

(A) In general

For purposes of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such

per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

(B) Other factors

In making a determination under this subsection, the Secretary shall—

(i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State; and

(ii) take into account the extent to which a program of State aid reflects the additional cost of providing free public education in particular types of local educational agencies, such as those that are geographically isolated, or to particular types of students, such as children with disabilities.

* * * * *

(c) Procedures for review of State equalization plans

(1) Written notice

(A) In general

Any State that wishes to consider payments described in subsection (b)(1) of this section in providing State aid to local educational agencies shall submit to the Secretary, not later than 120 days before the beginning of the State's fiscal year, a written notice of the State's intention to do so.

(B) Contents

Such notice shall be in the form and contain the information the Secretary requires, including evi-

dence that the State has notified each local educational agency in the State of such State's intention to consider such payments in providing State aid.

(2) Opportunity to present views

Before making a determination under subsection (b) of this section, the Secretary shall afford the State, and local educational agencies in the State, an opportunity to present their views.

(3) Qualification procedures

If the Secretary determines that a program of State aid qualifies under subsection (b) of this section, the Secretary shall—

(A) certify the program and so notify the State; and

(B) afford an opportunity for a hearing, in accordance with section 7711(a) of this title, to any local educational agency adversely affected by such certification.

(4) Nonqualification procedures

If the Secretary determines that a program of State aid does not qualify under subsection (b) of this section, the Secretary shall—

(A) so notify the State; and

(B) afford an opportunity for a hearing, in accordance with section 7711(a) of this title, to the State, and to any local educational agency adversely affected by such determination.

(d) Treatment of State aid

(1) In general

* * * * *

(2) Prohibition

A State may not take into consideration payments under this subchapter before such State's program of State aid has been certified by the Secretary under subsection (c)(3) of this section.

* * * * *

3. 34 C.F.R. 222.162 provides, in pertinent part:

What disparity standard must a State meet in order to be certified and how are disparities in current expenditures or revenues per pupil measured?

(a) *Percentage disparity limitation.* The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

* * * * *

4. 34 C.F.R. Pt. 222, Subpt. K. App. provides, in pertinent part:

APPENDIX TO SUBPART K OF PART 222—DETERMINATIONS UNDER SECTION 8009 OF THE ACT—METHODS OF CALCULATIONS FOR TREATMENT OF IMPACT AID PAYMENTS UNDER STATE EQUALIZATION PROGRAMS

The following paragraphs describe the methods for making certain calculations in conjunction with determinations made under the regulations in this subpart. Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these calculations.

1. *Determinations of disparity standard compliance under § 222.162(b)(1).*

(a) The determinations of disparity in current expenditures or revenue per pupil are made by—

(i) Ranking all LEAs having similar grade levels within the State on the basis of current expenditures or revenue per pupil for the second preceding fiscal year before the year of determination;

(ii) Identiyfing those LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and

(iii) Subtracting the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in paragraph (ii) and dividing the difference by the lower figure.

Example: In State X, after ranking all LEAs organized on a grade 9-12 basis in order of the expenditures

per pupil for the fiscal year in question, it is ascertained by counting the number of pupils in attendance in those agencies in ascending order of expenditure that the 5th percentile of student population is reached at LEA A with a per pupil expenditure of $820, and that the 95th percentile of student population is reached at LEA B with a per pupil expenditure of $1,000. The percentage disparity between the 95th and 5th percentile LEAs is 22 percent ($1,000-$820 = $180/$820).

* * * * *

970 A (b)

No. 05-1508

IN THE

Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, *et al.*,
Petitioners,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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QUESTION PRESENTED

Whether the United States Secretary of Education's certification of New Mexico as a State that "equalizes expenditures" was based on a permissible interpretation of the statutory Impact Aid disparity standard, 20 U.S.C. § 7709(b).

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IN THE

Supreme Court of the United States

No. 05-1508

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, *et al.*,
Petitioners,

v.

DEPARTMENT OF EDUCATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF FOR RESPONDENT

INTRODUCTION

This proceeding constitutes an attempt by two school districts in the State of New Mexico – Zuni Public School District No. 89 ("Zuni") and Gallup-McKinley County School District No. 1 ("Gallup") (collectively, "petitioners") – to overturn the State's long standing and carefully designed school-finance system. That system distributes state revenue dollars to local school districts in a manner that equalizes school operational funding throughout the state.

The petitioner school districts are local educational agencies ("LEAs") within the meaning of federal law that receive special funding from the federal government through the Impact Aid program. 20 U.S.C. § 7701 *et seq.* Impact Aid is

federal funding that compensates eligible school districts when their ability to raise local property tax revenue is reduced due to the presence of federal government operations on land within the school district.[1]

In general, states are prohibited from considering their school districts' Impact Aid receipts when determining the amount of *state* aid allocations to school districts. 20 U.S.C. 7709(a). However, federal law creates a single exception to this general prohibition: If the United States Secretary of Education (the "Secretary") certifies that the state has a state aid program that equalizes expenditures among its LEAs, that state is permitted to consider the Impact Aid funds that its LEAs receive when determining how to allocate state aid among LEAs. 20 U.S.C. § 7709(b)(1). In essence, a certified equalized state is authorized to adjust the amount of *state* aid to districts receiving Impact Aid, in accordance with a federally-mandated formula, to account for the receipt of a portion of the federal Impact Aid.[2]

The Impact Aid statute and the implementing regulations provide a detailed methodology for the Secretary to use in determining whether a state meets the criteria for the equalization exception. In this case, petitioners challenge the long-standing methodology – a methodology that originated in a federal regulation, that was subsequently enacted as a federal statute whose language was proposed by the Executive Branch, and that was subsequently incorporated by Congress into a related statutory program. As demonstrated herein, the Secretary correctly certified New Mexico as

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[1] The terms "LEA" and "school district" will be used interchangeably throughout this brief.

[2] Contrary to petitioners' claims (Pet. Br. at 46), a certified state's consideration of Impact Aid payments does not affect an LEA's benefit of receiving Impact Aid funds. The amount of federal Impact Aid that LEAs receive is *never* affected by this state decision making process, which only determines state aid allocations to its LEAs.

equalized. Accordingly, New Mexico properly considered the Impact Aid received by certain of its LEAs, including petitioners, in allocating state aid among all of its school districts.[3]

New Mexico distributes state resources for education in a manner that equalizes total revenues available to each student throughout the state at the highest level possible. If New Mexico were to allocate its state funding without taking into account the Impact Aid that LEAs such as petitioners receive, New Mexico would not be equalizing its funding. Rather, Impact Aid would exacerbate funding inequality because the LEAs receiving Impact Aid would receive what is essentially a double payment. In addition to receiving Impact Aid to help compensate for their particular difficulty in raising local revenue, these LEAs would receive the full amount of aid from the State under a state program designed to equalize available revenues per-pupil. Thus, these Impact Aid LEAs would receive one payment from the federal government and one from the State government, both with the effect of compensating them for the same lost revenues due to the impact of a federal presence. Meanwhile, LEAs that do not qualify for Impact Aid but face equal challenges in raising revenue would receive only one payment from the State.[4]

Accordingly, if New Mexico is not permitted to take Impact Aid into account, LEAs receiving Impact Aid will receive a substantial windfall at the expense of non Impact Aid districts. This will significantly undermine New Mexico's

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[3] The year at issue in this case is Fiscal Year ("FY") 2000. Petitioners, however, are in the process of administratively challenging the Secretary's certification of the State for every FY since then as well. These cases have been stayed pending the outcome of this case.

[4] Moreover, under the state distribution formula and a set amount of available funding, the state payment to LEAs not receiving Impact Aid would necessarily be decreased from current levels as a necessary result of increasing state payments to Impact Aid LEAs.

attempts to equalize its school district funding and, indeed, create a significant disincentive for equalization. This is precisely the *opposite* of the result Congress intended: Congress created an exception allowing equalized states to consider Impact Aid in making their state aid determinations in order to "prevent impact aid from hindering states' equalization efforts and [to prevent] duplicative compensation of school districts affected by federal activity (once by the federal government through impact aid and a second time by the state's equalization program)." U.S. Gen. Accounting Office, *School Finance: State Efforts To Equalize Funding Between Wealthy and Poor Districts, GAO/HEHS 98-92*, 16 (June 6, 1998).

Understandably, petitioners would prefer that the Impact Aid they receive not be considered when the State performs its equalization among school districts. In that scenario, a greater share of State funds would flow to petitioners, and thus a higher total revenue per student for students attending petitioners' schools would result from the combination of Impact Aid and state aid. This is a zero-sum game, however; and a necessary consequence of this scenario is that a lower share of State funds would flow to those LEAs not receiving Impact Aid. New Mexico's goal, however, is to equalize the revenues available to *each* student throughout the State (*i.e.*, to equalize all per-pupil revenues in the state) regardless of which LEAs they attend.

Petitioners' attack on New Mexico's equalization system is based on their erroneous claims (1) that the Secretary misread the statute in promulgating the interpretive regulations employed in the equalization certification process and (2) that under the singular, correct reading of the statute, the State would not qualify for certification and would not be permitted to take Impact Aid into account in making its allocations to LEAs throughout the State. As we now show, however, the statute at issue is ambiguous; the Secretary's reading is emi-

nently reasonable; and the Secretary's determination that New Mexico is equalizing school funding among school districts should be affirmed. Indeed, the Secretary's regulations reflect the only reading that harmonizes the text of the statute with its context and purpose and that is consistent with the evolution of the Impact Aid program and the origin of the statutory language in a bill proposed by the Department of Education itself.

STATEMENT OF THE CASE

A. Historical Background.

The modern movement towards school finance equalization at the state level finds its origins in the decision of this Court in *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). In *Rodriguez*, the parents of students attending low-wealth and majority-minority school districts in San Antonio, Texas sued the City, arguing that wealthy districts unjustly benefited due to the use of property taxes to fund the schools and that this inequity in school funding violated the parents' and students' constitutional rights to equal protection of the laws. *Id.* at 4-5. The Supreme Court disagreed with the plaintiffs and held that, because education is not a fundamental right and wealth is not a suspect class requiring heightened scrutiny, no federal constitutional violation resulted from these widespread, substantial funding disparities. *Id.* at 18.

Despite its denial of relief, this Court also observed that the education finance system "may well have relied too long and too heavily on the local property tax," and emphasized that its decision should not be viewed as placing a "judicial imprimatur" on the school finance system. *Id.* at 58. The Court encouraged state legislators, *inter alia*, to seek solutions to this problem. *Id.* at 59. This decision caused school finance reform advocates to look principally to state legislatures and

state courts to redress the substantial fiscal inequality in the states' school finance systems.

Accordingly, although the *Rodriguez* litigation was unsuccessful in the federal constitutional arena, numerous challenges to school funding disparities were brought under state constitutions. These challenges, in turn, spurred legislative interest in school equity finance at the state level. Relevant here, in the early 1970s, in New Mexico, a group of plaintiffs filed a lawsuit challenging the constitutionality of the State's education finance system on the ground the expenditures varied substantially based on the wealth of the school district. This case was settled before trial when New Mexico decided to fund virtually all the operational costs of its school districts at the state level and to provide essentially equal resources to each district.

New Mexico's 1974 Public School Finance Act resulted in state funding of over 80% of local education costs, "second only to Hawaii in this regard, and the system has continued to produce more equitable funding than systems in most states." *See* http://www.schoolfunding.info/states/nm/lit_nm.php3 (last visited Dec. 13, 2006).[5] As New Mexico's Legislative Education Study Committee ("LESC") explained: "Two objectives were essential to the development of the K-12 formula 1) to equalize educational opportunity statewide (by crediting certain local and federal support and then distributing state support in an objective manner) and 2) to retain local autonomy in the actual use of funds." Roberta L. Derlin, New Mexico School Finance: An Historical Perspective 4 (March 23, 1996) (unpublished paper presented at the American Education Finance Association Annual Meeting), available at http://www.eric.ed.gov/ERICDocs/data/ericdocs2/content_storage_01/0000000b/80/23/99/4c.pdf (last visited

[5] Numerous states have been required to address this issue following litigation in state courts.

Dec. 13, 2006) (quoting *State of New Mexico LESC Report to the Legislature*, at 1 (1995)). As one scholar summarized: "The New Mexico K-12 funding formula developed in 1974 to meet these objectives was considered the 'most far-reaching equalization concept in current law in the United States." *Id.* (quoting *State of New Mexico LSSC Report to the Legislature*, at 5 (1975)).

After *Rodriguez*, the Federal Government, too, decided that while school finance equalization was not a federal constitutional imperative, federal policy should support state efforts to equalize. In 1974, Congress amended the statute authorizing the Impact Aid program to include the equalization exception described above. This exception encourages equalization by allowing equalized states to consider the Impact Aid received by a school district when it allocates state aid among its school districts. *See* Education Amendments of 1974, Pub. L. No. 93-380, § 305(a)(1), 88 Stat. 484 (1974). In that same legislation, Congress enacted a separate federal grant program to assist states in planning for equalization in their programs of state aid for public education.[6] The purpose was to help states implement programs of state aid that "achieve[d] equality of educational opportunity for all children in attendance at the schools of the local educational agencies of the state." *See* Pub. L. No. 93-380, § 842, 88 Stat. 484 (1974).

This established federal policy encouraging state equalization efforts continued into the 1990s. The Improving America's Schools Act of 1994 ("IASA"), which reauthorized the Elementary and Secondary Education Act of 1965, main-

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[6] Four years later, Congress replaced that program with an equalization assistance program. Similar to its predecessor, this successor grant program provided states with federal financial assistance "to revise their systems of financing . . . in order to achieve a greater equalization of resources among school districts." Education Amendments of 1978, Pub. L. No. 95-561, § 1202, 92 Stat. 2143 (1978).

tained the equalization exception and established the Education Finance Incentive Program. Pub. L. No. 103-382, Title I § 1125a, 108 Stat. 3518, 3575-77 (1994). This program, which still operates today, awards additional federal money to states based on the degree of fiscal effort they make in school funding (*i.e.*, the level of state spending relative to the state's ability to pay), and based on the funding equity achieved. *See* 20 U.S.C. § 6337 (2006). Congress incorporated the regulation at issue here into the statute establishing this new program. Specifically, Congress directs the Secretary, when evaluating the funding equity achieved by a state, to consider whether that state meets the disparity test set forth in the regulatory scheme at issue here. 20 U.S.C. § 6337(b)(3)(B).

B. Statutory and Regulatory Framework.

As noted *supra*, the federal Impact Aid program (20 U.S.C. §§ 7701-7714) provides financial assistance to LEAs in areas where the federal government has adversely impacted an LEA's ability to provide educational services to school age children.[7] Such adverse impact generally occurs when the LEA's ability to raise local revenues is reduced due to the federal government's acquisition of real property (*e.g.*, government buildings, military bases, Indian reservations), or because the LEA provides educational services to a large number of children residing on, or whose parents are employed on, federal property. *See* 20 U.S.C. §§ 7701-7714 *et seq*. The amount of Impact Aid a school district receives is computed under a formula that is based on "the number of [federally-affected] children who were in average daily attendance in the schools of such [LEA]." 20 U.S.C. § 7703(a) & (b).

In general, the law prohibits a state educational agency ("SEA") from considering an LEA's receipt of federal Impact

[7] The Impact Aid program was originally passed by Congress and signed into law by President Truman in 1950.

Aid funds when determining the amount of financial assistance the State will provide to the LEA. 20 U.S.C. § 7709(a). There is, however, an exception to this general prohibition. An SEA is authorized by the Impact Aid statute to consider an LEA's receipt of federal Impact Aid funds if the Secretary certifies that the SEA has in effect a program of state aid that equalizes expenditures for free public education among all LEAs in the state. 20 U.S.C. § 7709(b).

This exception to the general prohibition on an SEA's ability to consider its LEAs' receipt of Impact Aid funds was first enacted in 1974.[8] In that legislation, Congress left all discretion with respect to defining "equalizing expenditures" to the Secretary of Education. *See* 20 U.S.C. § 240(d)(2)(b) (Supp. IV 1974) (Pet. App. at 70a). In 1976, after notice and comment rulemaking, the Secretary adopted regulations addressing the definition of equalization.[9] *See* 42 Fed. Reg. 15,544 (Mar. 22, 1977); 42 Fed. Reg. 18,279 (Apr. 6, 1977); 42 Fed. Reg. 65,524 (Dec. 31, 1977). In doing so, the Secretary granted states seeking to be certified as equalized the option of meeting any one of three different standards: the disparity standard, the wealth neutrality test, and consideration for exceptional circumstances.[10] 34 C.F.R. § 222.61(d) (1993).

Relevant here, under the disparity standard, the Secretary determined that a state would be equalized if the disparity in per-pupil expenditures among a state's LEAs was no greater than 25%. *See* 41 Fed. Reg. 26,320, 26,327 (June 25, 1976).

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[8] Not surprisingly, this provision was enacted on the heels of the *Rodriguez* decision and reflects Congress' general intent to encourage state equalization efforts.

[9] Proposed rulemaking occurred in 1975, 1976, and 1977. *See* 40 Fed. Reg. 19,114 (May 1, 1975); 41 Fed. Reg. 26,330 (June 25, 1976); 42 Fed. Reg. 15,540 (Mar. 22, 1977).

[10] These standards were found, respectively, at 34 C.F.R. § 222.63 (1993), 34 C.F.R. § 222.64 (1993), and 34 C.F.R. § 222.65 (1993).

The methodology to be used in determining the size of the disparity was set forth in Appendix A to this regulation. First, the Secretary ranked LEAs by per-pupil expenditures or revenues. Second, the Secretary identified those LEAs that were "at the 95th and 5th percentiles of the total number of pupils in attendance in the schools" of the state. 41 Fed. Reg. at 26,329 (Pet. App. at 159a-160a). Finally, the Secretary compared the per-pupil revenues of the two identified LEAs to determine whether the disparity exceeded 25%. *Id. See also id.* at 26,327. The effect of this calculation was to exclude from consideration the LEAs whose pupil populations provided 5% of the overall state pupil population at each end of the spending range for state LEAs.

The Secretary retained three regulatory options for states to use to qualify as equalized until 1994. In 1994, however, the Secretary decided to alter this regulatory scheme. At the request of the U.S. Department of Education, Congress eliminated the other equalization options and codified the disparity standard as the sole method for determining if a state is equalizing expenditures. The U.S. Department of Education drafted what would become the new language in the Impact Aid program. As part of the IASA, the Department's proposal entered both the House, via H.R. 3130, and the Senate, via S. 1513, with identical language.

The Department's requested language for IASA Section 8009(b)(2)(A) – appearing in both H.R. 3130 and S. 1513 – read as follows:

> (2)(A) For the purpose of paragraph (1), a program of State aid equalizes expenditures among local educational agencies if, in the second preceding fiscal year, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by or per-pupil revenues available to,

> the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

H.R. 3130, 103d Cong., 1st Sess. (1993) (as introduced on Sept. 23, 1993); S. 1513, 103d Cong., 1st Sess. (1993) (as introduced on Oct. 4, 1993). The Department's proposal itself also included the language that is at issue in this case, specifically a general parameter to implement the disparity determination and to account for anomalies in the data considered:

> In making a determination under this subsection, the Secretary shall –
>
> > disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile of such expenditures or revenues in the State.

H.R. 3130 (as introduced on Sept. 23, 1993); S. 1513 (as introduced on Oct. 4, 1993).[11]

Again, all of this language was drafted and proposed to Congress by the U.S. Department of Education. Sponsors of both bills included statements in their opening remarks recognizing that the language of these bills was requested by the Department. For example, the Hon. Dale E. Kildee, sponsor of H.R. 3130 referred to the bill as "the administration's proposal." 139 Cong. Rec. 2,237 (1993). On the Senate side, Senator Kennedy announced, "I am pleased to introduce on behalf of the administration . . ." and referred to the language as what "The administration is proposing" and "The administration's proposal calls for . . ." 139 Cong. Rec. 23,416 (1993). Senator Pell, a co-sponsor of S. 1513, added:

> [t]he Department of Education, under the exceptionally able leadership of Secretary Richard Riley, has devel-

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[11] Because New Mexico employs per-pupil revenue figures, "per-pupil expenditures or revenues" will be shortened to per-pupil revenues throughout the brief. New Mexico abbreviates these LEA funding levels as "revenue per MEM."

> oped a thoughtful, comprehensive initiative for reauthorization . . . a proposal that merits our careful consideration.

139 Cong. Rec. 23,512 (1993). Another co-sponsor, Senator Jeffords, also added remarks reflecting that S. 1513 was the administration's proposal, ("[we are] introducing – on behalf of the administration – the proposal for reauthorizing . . ."). 139 Cong. Rec. 23,514 (1993). Further, S. 1513 announces on its face that the sponsors introduced the bill "by request." S. 1513 at 1 (as introduced on Oct. 4, 1993). This expression is commonly used, and denotes that a given bill is the administration's proposed bill – the language that the administration requests from Congress.[12] Beyond acknowledging this proposal as coming from the Department, the legislative history nowhere discusses any other congressional intent with respect to the enactment of this language.

The resulting bill was passed and signed into law on October 24, 1994 as Public Law Number 103-82 with only minor changes to the Department's proposed language.[13] This is the

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[12] The expression "by request" is included in the House of Representatives rules manual and is discussed in several Congressional documents. *See Rules of the House of Representatives*, H.R. Doc. No. 241, 109th Cong., 1st Sess., rule XII §7(b)(5) at 606 (2005). For example, the 2003 House of Representatives document "How Our Laws Are Made," explains, "Occasionally, a Member may insert the words 'by request' after the Member's name to indicate that the introduction of the measure is at the suggestion of some other person or group—usually the President or a member of his Cabinet." H.R. Doc. No. 93, 108th Cong., 1st Sess., pt. 5, at 8-9 (2003). Similar explanations also appear in Senate documents. According to the Senate document *Enactment of a Law*, "Bills to carry out the recommendations of the President are usually introduced "by request" by the chairmen of the various committees or subcommittees thereof which have jurisdiction of the subject matter." United States Senate, *Enactment of a Law*, ch. 4, Origins of Legislation, *available at* http://www.senate.gov/legislative/common/briefing/Enactment_law.htm.

[13] The resulting bill, H.R. 6, absorbed H.R. 3130 and S. 1513. Two minor changes were made to the language initially proposed by the De-

language that remains in effect today and, as noted, includes the language that is at issue in this case. Since 1994, Congress has revisited and reauthorized the Impact Aid Program without making any changes to the relevant language. Thus, the statutory language at issue is that language that the Department of Education requested that the Congress enact.

Specifically, the statutory equalization or disparity test provides as follows:

> [a] program of State aid equalizes expenditures among local educational agencies if, in the second fiscal year preceding the fiscal year for which the determination is made, the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest such per-pupil expenditures or revenues did not exceed the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the lowest such expenditures or revenues by more than 25 percent.

20 U.S.C. § 7709(b)(2)(A). As requested by the Department, the statute includes a general parameter further requiring the Secretary, when making the disparity determination under the above provision, to:

> disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State.

20 U.S.C. § 7709(b)(2)(B)(i). The statute provides no further specifics addressing how the Secretary is to apply the disparity test.

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partment. First, the phrase "fiscal year preceding the FY for which the determination is made" was added in section (b)(2)(A) to clarify the meaning of "second preceding fiscal year." Second, the final law includes "or below the 5th percentile" in section (b)(2)(B)(1). All of the language at issue here was requested of Congress by the Department of Education.

Following the 1994 reauthorization, the Department of Education amended the relevant regulations to address the new language of the statute, *i.e.*, the language it had proposed to Congress. Because the statute specified the use of the disparity test and eliminated the other two options for achieving equalization, the regulations had to be amended to eliminate those options. *See* 60 Fed. Reg. 50,774, 50,797-00 (Sept. 29, 1995) (later published at 34 C.F.R. § 222.162(a); 34 C.F.R. pt. 222, subpt. K, app. (1996)).[14] With respect to the remaining option for determining equalization, the disparity test, the Department drafted 34 C.F.R. § 222.162(a) to directly mirror the statutory language:

> The Secretary considers that a State aid program equalizes expenditures if the disparity in the amount of current expenditures or revenues per pupil for free public education among LEAs in the State is no more than 25 percent. In determining the disparity percentage, the Secretary disregards LEAs with per pupil expenditures or revenues above the 95th or below the 5th percentile of those expenditures or revenues in the State. The method for calculating the percentage of disparity in a State is in the appendix to this subpart.

34 C.F.R. § 222.162(a) (1996). These changes simplified the predecessor regulations. *Compare with* 34 C.F.R. §§ 222.62-222.65 (1993). The new language maintained the predecessor regulations' reference to the subpart's appendix for the specific method for calculating the percentage of disparity. The appendix referenced by the regulation (the "Subpart K Appendix") set forth a precise methodology for conducting the disparity test. It retained the methodology for implement-

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[14] The rulemaking notice states that "the Secretary in this final regulation has removed regulations that are obsolete due to changes made in the statute by the Improving America's Schools Act of 1994 (IASA), or that are unnecessary due to the fact that they simply repeated statutory provisions." 60 Fed. Reg. 50,774 (Sept. 29, 1995).

ing the 95th and 5th percentile exclusions that had been set forth in the appendix to the predecessor regulations.

In accordance with the Subpart K Appendix, the Secretary takes the following steps in applying the disparity test:

> (1) Rank all LEAs on the basis of current expenditures or revenues per pupil;
>
> (2) Identify the LEAs in each ranking that fall at the 95th and 5th percentiles of the total number of pupils in attendance in the schools of those LEAs; and,
>
> (3) Subtract the lower current expenditure or revenue per pupil figure from the higher for those agencies identified in step (2), and divide the difference by the lower figure.

See 34 C.F.R. pt. 222, subpt. K, app. (1996). Under the statute and regulation, if the resulting figure is 25 percent or less, that state's system qualifies as equalized. 20 U.S.C. § 7709(b)(2)(A); 34 C.F.R. § 222.162(a) (1996).

The 1995 regulations accomplished exactly what was intended by the reauthorization of the Impact Aid Program – they established the Department's disparity test as the sole standard for certification, just as "requested" and "proposed" to Congress by the Department, but left the disparity test itself intact.

C. New Mexico's Funding Equalization Process.

The New Mexico School Funding Formula aims to equalize financial opportunity at the highest possible revenue level and to guarantee each New Mexico public school student equal access to programs and services appropriate to his or her educational needs regardless of geographic location or local economic conditions.[15] Under this formula, New

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[15] The New Mexico Public School Finance Act governing the state equalization program is codified at N.M. Stat. Ann. § 22-8-1 *et seq.* (1978).

Mexico guarantees each LEA 100% of its calculated program cost.[16]

In determining program cost, the formula takes into account the variation in costs associated with providing educational services to students with differing needs. For example, research indicates that educating high school students costs more than educating first graders and that additional funding is required for the provision of bilingual education and special education services. To account for these cost differentials, the state calculates program cost using units rather than pupils. For example, a tenth grade student is counted as 1.25 units to account for the higher cost in educating high school students. The district's total number of program units is multiplied by the program unit value to determine the district's program cost.[17]

Next, the State determines the amount for each district's state equalization guarantee ("SEG") allocation by considering each district's program cost in conjunction with portions of certain local and federal revenues received by the district. Specifically, the State subtracts from the program cost a portion (75%) of each (i) school district property tax revenue, (ii) federal forest reserve funds, and (iii) the Impact Aid that the State is permitted to consider. The resulting figure is the district's total SEG, the amount of money allocated by the State to defray the program cost.

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[16] The program cost is the amount of money assumed under the formula to be necessary for a given district with a particular configuration of students and educational programs to provide educational services.

[17] The New Mexico Secretary of Public Education establishes the program unit value by dividing the legislatively appropriated program cost (comprised of the appropriated state equalization guarantee plus the projected credits for Impact Aid, forest reserve, and the .5 mill levy) by the total number of units generated by all school districts for a given fiscal year.

It is noteworthy that the actual revenues available to a school district include certain types of nonrecurring revenues that are not considered when determining each LEA's SEG but are nonetheless included when the disparity test is applied. For example, user fees, insurance recoveries, and nonrecurring federal grants are all included in determining an LEA's per-pupil revenue level for purposes of the disparity test and have the ability to significantly augment the amount of funds available to a school district for a given year. These non-recurring exceptional revenues can lead to districts having very high per-pupil revenue levels despite the state equalization process.

D. Procedural History.

On October 5, 1999, the Assistant Secretary for Elementary and Secondary Education conducted the analysis required under the statute and its implementing regulations and certified New Mexico as an equalized state under section 8009(b) of the Impact Aid law for FY 2000.[18] Accordingly, New Mexico was authorized to consider a portion of the federal Impact Aid funds received by its LEAs when determining state aid allocations for LEAs and making those disbursements for free public education for FY 2000. See 20 U.S.C. § 7709(b)(1).

The Department's certification of New Mexico's equalization program has undergone numerous reviews, each review concluding that the Department's certification of the State's voluntary equalization program met the requirements of federal law.[19] Both the administrative law judge (the "ALJ")

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[18] Section 8009(b) of the Impact Aid law is codified at 20 U.S.C. § 7709.

[19] Petitioners mistakenly state on page four of their brief that an annual certification hearing was conducted for fiscal year 2000. In fact, no certification hearing was held that year since no LEA acted on its right to request a hearing. As stipulated to by the parties in this case, only

assigned to hear the case and the Secretary concluded that New Mexico's program complied with the statutory requirements and that the Department correctly certified New Mexico as an equalized state under 20 U.S.C. § 7709(b). *Zuni Public School District No. 89*, Dkt. No. 99-81-I (Dep't Education Initial Decision April 17, 2001), 2001 WL 34402493 (ED.O.H.A.) (Pet. App. at 43a-58a.); *Zuni Public School District No. 89*, Dkt. No. 99-81-I (October 11, 2001), 2001 WL 34798131 (EDDS) (Pet. App. at 34a-40a).

On appeal from the ALJ decision, the Secretary specifically addressed petitioners' allegation that the regulation at 34 C.F.R. § 222.162(a), including the appendix thereto, failed to properly implement the disparity test set forth at 20 U.S.C. § 7709(b). The Secretary concluded that because the statute is ambiguous and because the regulations are consistent with the statute, the Department's regulatory scheme for determining disparity under 20 U.S.C. § 7709(b) is a reasonable and permissive implementation of the statute and must be upheld. (Pet. App. at 37a-40a.) Regarding the Department's promulgation of a specific methodology for calculating a state's disparity, as set forth in the Subpart K Appendix, the Secretary determined that "[t]here is nothing within the text of the statute that precludes this interpretation or requires another result." (Pet. App. at 39a.)

On Petition for Review, a Tenth Circuit panel also considered and upheld the Department's certification of the State's equalization program. *Zuni Pub. Sch. Dist. No. 89* v. *U.S. Dep't of Educ.*, 393 F.3d 1158 (10th Cir. 2004) (Pet. App. at 3a-33a.). After a thorough analysis of the statutory and regulatory scheme, the Tenth Circuit panel also found the

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"Bloomfield Schools requested a hearing but subsequently withdrew its request. As a consequence, no predetermination hearing was held since no other LEA requested a predetermination hearing. The determination was based on the State's data submission." (Pet. App. at 202a.)

statute ambiguous, and concluded that the Department's construction of 20 U.S.C. § 7709(b)(2), through its application of the disparity calculation methodology laid out in the regulation, is permissible. *Id.* at 1168. (Pet. App. at 18a-19a.) One judge dissented from the panel's majority opinion because, in his view, the statutory language at issue is unambiguous. See *Id.* at 1170 (O'Brien dissenting) (Pet. App. at 23a-24a.).

The Tenth Circuit Court of Appeals granted Petitioners' Motion for Rehearing En Banc.[20] Subsequently, the en banc Tenth Circuit divided evenly, and the decision of the agency was affirmed by the equally divided court of appeals. *Zuni Pub. Sch. Dist. No. 89 v.U.S. Dep't of Educ.*, 437 F.3d 1289 (10th Cir. 2006) (en banc) (Pet. App. 1a-2a.). This Court granted the petition for certiorari to the Tenth Circuit.

SUMMARY OF THE ARGUMENT

The Court of Appeals correctly affirmed the Secretary of Education's decision that New Mexico is an equalized state for purposes of the Impact Aid program. In promulgating these regulations, the Secretary exercised the authority delegated to him by Congress and reasonably interpreted ambiguous statutory text describing a highly technical process for determining whether a state has equalized its school districts' revenues. Because the statute is ambiguous, the Secretary's interpretation must be upheld if it is reasonable under the framework established in *Chevron U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984).

The statute at issue in this case, § 7709(b)(2)(B)(i), is ambiguous. In relevant part, it instructs the Secretary that, in performing the disparity calculation, he shall "disregard local

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[20] In accordance with Tenth Circuit Rule 35.6 and as directed by specific order issued by the Tenth Circuit Court of Appeals, the panel opinions were vacated when rehearing *en banc* was granted.

educational agencies with per-pupil expenditures or revenues above the 95th percentile of such expenditures or revenues in the State." The statute does not, however, specify a methodology for doing so, and there are at least two alternatives.

Specifically, a percentile is a value in a data set; thus, in order to determine a percentile, one must first identify the relevant data set. Section 7709 identifies the relevant data set as per-pupil revenues in the State, and it is this phrase which is ambiguous. In petitioners' view, the only possible data set defined by this phrase is a list of the amounts of each LEA's average per-pupil expenditure or revenue level (a list of roughly 90 data points in New Mexico). This is wrong. Each pupil in the State may be deemed to have his or her own per-pupil revenue. Thus, the text may reasonably be interpreted to identify a data set composed of all of the per-pupil revenues in the state – a data set with a data point for each pupil in a state. Under that reading, the revenue numbers that lie at the 95th and 5th percentiles of the data set composed of all individual pupils' per-pupil revenue numbers are identified, and then, only after this identification, the LEAs that have per-pupil revenues above and below those numbers, respectively, are excluded. This is exactly the result the Secretary's regulations achieve.

The ambiguity of section 7709 is made even more evident when it is considered in the context of the statute as a whole and in light of its history and purposes. The statutory text had its origin in an administration proposal to eliminate two of the three regulatory tests for determining equalization and to codify the Department's third test – the disparity test – as the sole test. Congress enacted the Administration bill without comment or elaboration, in no way suggesting any disagreement with the Department's long-standing disparity test for determining whether a state is equalizing. Indeed, the legislative record is devoid of any expression of congressional intent apart from acceptance of the Department's proposal. This

statute thus cannot be read, as petitioners do, to *discard* the established disparity process for determining equalization *sub silentio*, and to impose a dramatically different process – indeed, a process that would produce results that the Department had previously rejected as "unfair and inconsistent." 41 Fed. Reg. at 26,324.

Moreover, petitioners' reading of section 7709 utterly ignores its statutory context. The Impact Aid program considers the *numbers of federally-affected pupils* in school districts in determining how much Impact Aid should be provided. 20 U.S.C. § 7703(a) & (b). The other equalization incentive in Title I of IASA, the Education Finance Incentive program, considers the *numbers of pupils* in school districts in awarding funds, 20 U.S.C. § 6337(b)(3); and expressly incorporates and endorses the Secretary's regulation implementing the disparity test. And, the statute's definition of LEA reflects a federal interest in forbidding states to manipulate the number of school districts to distort the distribution of Impact Aid, 20 U.S.C. § 7713. Section 7709 was thus enacted in a statutory context that reveals a clear congressional intent to support aid and equalization based on the numbers of pupils affected, not based on the number of school districts affected, and an express congressional affirmation of the Secretary's interpretation. On petitioners' reading, however, Congress ordered the Secretary to calculate the amount of Impact Aid for each school district *based on the number of affected pupils*, but also ordered the Secretary to determine whether a state was equalizing expenditures among its LEAs (and thus entitled to consider a school district's Impact Aid in allocating state funds) *without considering the number of pupils*. This makes no sense.

Because the statutory language at issue is ambiguous, and because the regulatory scheme implementing the statute constitutes a reasonable interpretation, indeed the best interpretation, of the language in this context, this Court should affirm

the Tenth Circuit's judgment affirming the Secretary's interpretation of § 7709(b)(2)(B) and certifying New Mexico as a state "equalizing expenditures."

ARGUMENT

THIS COURT SHOULD AFFIRM THE SECRETARY'S DECISION.

Where the decision of a federal agency is at issue and involves the agency's interpretation of federal statutes, as in the case at bar, the Court's review is guided by the principles established in *Chevron, U.S.A., Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984), and its progeny. Under *Chevron*, courts conduct a two-step analysis: determining (i) whether the statute unambiguously resolves the interpretative question and (ii) if not, whether the agency's interpretation is a permissible and reasonable one.

"Statutory construction is a 'holistic endeavor.'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004). Thus, in conducting the first step of this analysis, this Court examines not only "the language itself," but also "the specific context in which the language is used, and the broader context of the statute as a whole." *Robinson* v. *Shell Oil Co.*, 519 U.S. 337, 341 (1997).

The precise question in this case is the meaning of language that explains when a state may be deemed to have "equalize[d] expenditures for free public education among [school districts]" as a matter of federal law. 20 U.S.C. § 7709(b)(1) (2000 & Supp. III 2003). As we now show, the statutory language that describes the process for determining whether a state has equalized expenditures is ambiguous, and the Department of Education's interpretation of that text is a reasonable and thus permissible reading of highly technical statutory language. It is, indeed, the only reading of the language that is consistent with the statutory history and context and with congressional intent.

I. THE STATUTE AT ISSUE IS AMBIGUOUS.

A. The Text By Itself Is Ambiguous.

The statute at issue in this case, 20 U.S.C. § 7709, states that in making the determination whether a state is equalized, the Secretary shall "disregard [LEAs] with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." *Id.* § 7709(b)(2)(B)(i). This language fails to provide a clear methodology for the disparity test and is clearly open to multiple interpretations. Indeed, when considered in the context of the history of its enactment and amendment and of the other provisions of the Impact Aid program and Title I, section 7709 cannot be read as petitioners urge.

Initially, section 7709 does not address or prescribe a precise methodology for use in conducting the disparity test. The statute allows states to exclude LEAs above the 95th percentile or below the 5th percentile of per-pupil revenues when determining disparity, but does not provide the Department with precise directions for determining what the 95th and 5th percentiles of "such per-pupil revenues in a State" are. The statute makes clear that some LEAs are to be disregarded before performing the disparity test, and it is also clear that the 95th and 5th percentiles of per-pupil revenues must be identified. The statutory language is unclear, however, about the meaning of the phrase "per-pupil expenditures or revenues above the 95th or 5th percentile of those expenditures or revenues in the State"; and this phrase is open to multiple interpretations. As the Secretary noted:

> Although the impact aid statute sets forth the parameters for calculating state public education expenditures or revenues under the disparity test, the statute does not contain a specific implementation of the disparity test; instead, Congress left that gap to be filled by regulations, which has been duly promulgated at an appendix to Subpart K of 34 C.F.R. Part 222.

Zuni Public School District No. 89, Dkt. No. 99-81-I (Oct. 11, 2001), 2001 WL 34798131. (Pet. App. at 37a.) Because the statute merely provides parameters for determining disparity, the Secretary was free to establish the precise methodology to be applied so long as his choice was not "procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *United States* v. *Mead Corp.*, 533 U.S. 218, 227 (2001) (citing *Chevron*, 467 U.S. at 844). It is the Secretary who is in the best position to assess the implications of the statutory language, to determine whether that language is susceptible to multiple interpretations, and to settle upon a reasonable interpretation to implement the statute.

Like the Secretary, the Court of Appeals panel agreed with the Secretary and found the statute ambiguous:

> We agree with the Secretary's determination that the statute is ambiguous . . . we do not know what calculations Congress intended by 'such [per pupil] expenditures in the State.' Even Zuni conceded in its argument before the ALJ that the statute 'may be ambiguous [as] to the precise formula that is to be used.' *Id.*, doc. 16 at 10. The statute's ambiguity, coupled with the gap left by Congress regarding the specific means by which to implement the disparity test, requires us, in accordance with the well-established rule laid out in *Chevron*, to give deference to the Secretary's interpretation of the statute if we deem that interpretation to be reasonable or [permissible].

Zuni, 393 F.3d at 1166-1167. (Pet. App. at 16a-17a.)[21]

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[21] Further support for the conclusion that the statutory text is ambiguous lies in the multiple interpretations of the statute (at least four) that have been suggested in the course of the proceedings of this case. From the inception of this case, even petitioners, have recognized that there are multiple possible interpretations of the statutory text. (*See e.g.*, Pet. En Banc Reply Br. at 4.) Initially, petitioners proffered two different ap-

Petitioners concede that the Secretary's methodology would be a reasonable approach if reconcilable with the language of the statute. The single burden of their brief is a contention – inconsistent with their position below, *See* n.21, *supra* – that section 7709 has only one possible interpretation. Specifically, petitioners adopt Judge O'Brien's reading which focuses instead on the meaning of "percentile" (a word neither the Department nor New Mexico contends is ambiguous), and ignores the phrase "such per-pupil revenues in the state," a phrase which has at least two possible interpretations relevant here.

Because petitioners' brief and Judge O'Brien's dissent address only the meaning of the word "percentile," both read the statute to require that Department determine the single figure representing the amount that each LEA spends on the average on each pupil, and then rank LEAs based on their average expenditure levels. Both fail to consider the meaning of the phrase "such per-pupil revenues in the state," and to recognize that it may not mean the *single* amount an LEA spends on the average on each pupil, but instead may refer to

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proaches for making the disparity calculation: (i) eliminate 5% of the LEAs that are at either end of the spectrum, regardless of how many pupils are served by those LEAs; or (ii) calculate 95% of the per-pupil expenditures or revenues for the LEA with the highest per-pupil expenditures or revenues and eliminate any LEA whose per-pupil expenditures or revenues is above that amount, and implement a corresponding exclusion of LEAs at the low end of the spectrum. (*See* Pet. App. at 15a.) Before the Tenth Circuit panel, petitioners argued that section 7709(b)(2)(B)(i) would permit the Secretary to adopt either of two different approaches, neither of which the statute specifically identifies. In his dissenting opinion, which petitioners now rely upon, Judge O'Brien developed a fourth methodology that differed from the Secretary's methodology and from the two alternative methodologies proffered by petitioners. *See Zuni*, 393 F.3d at 1170-1172 (O'Brien, dissenting) (Pet. App. at 24a). The parties' long-term recognition that a variety of methods could be utilized to conduct the disparity test is significant evidence that the statutory text is susceptible to multiple, reasonable interpretations.

all "per-pupil revenues" for which each LEA is responsible. That is, every student in New Mexico has a "per-pupil revenue," and the list of all of those individual student numbers constitutes "such per-pupil revenues in the State."

On this view, the statute may be read to require the Secretary to list the per-pupil expenditure for *all pupils* in the state, to find the 95th and 5th percentile of that list, and to disregard the LEAs whose per-pupil revenues are above and below those percentiles. This is the functional equivalent of disregarding LEAs with the five percent of students who receive the highest per-pupil spending and the five percent of students who receive the lowest per-pupil spending. The Secretary's methodology – which frames its inquiry in terms of student population – thus considers the entire universe of per-pupil expenditures for the state. This is a legitimate alternative reading of the phrase "such expenditures or revenues in the state."

More specifically, a percentile is a value in a data set; thus, in order to determine a percentile, one must first identify the relevant data set. In petitioners' view, the only possible data set identified by the statute is the list of the amounts of each LEA's average per-pupil expenditure or revenue level. Accordingly, only those LEAs with average per-pupil expenditure or revenue levels above the 95th and below the 5th percentile in the data set consisting of the amount of each LEA's average per-pupil expenditure level would be excluded before the Secretary determines whether the state is equalizing expenditures. This is not, however, the only possible data set identified by the statute. The text may reasonably be interpreted to identify a data set composed of all of the per-pupil revenues in the state – a data set that would correspond in size to the state's student population because every student in the state has a corresponding per-pupil revenue. Under that approach, the revenue or expenditure numbers that lie at the 95th and 5th percentiles of the

data set composed of all individual pupils' per-pupil expenditure numbers are identified, and then, only after this identification, the LEAs that have per-pupil expenditures or revenues above those numbers are excluded.

The text at issue is ambiguous even when read in isolation. And, as we now show, the statutory context in which section 7709 is embedded strongly supports the Secretary's reading of the statute and weighs heavily against petitioners' reading of the text.

B. The Statutory Scheme As A Whole Supports The Secretary's Interpretation.

As this Court has explained, a statutory "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme . . . because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) (citations omitted). The statutory scheme at issue has several aspects that demonstrate that Congress was concerned about both allocating Impact Aid and encouraging state equalization efforts as measured by the numbers of pupils affected, and not based on the numbers of school districts affected.

First, Impact Aid is allocated under a method that expressly considers pupil population in determining how much aid a federally-affected district should receive. *See* 20 U.S.C. § 7703(a). Specifically, the statute requires a determination of how many federally-affected pupils are served by a particular school district, and then conducts a calculation that assigns a weighted value to students based on the degree and type of federal effect at issue. *Id.* This results in a "total number of weighted student units" for each LEA and determines the "basic support payment." *Id.* § 7703(a)(2). School districts, in other words, are not treated as fungible, equal

units. They are treated differently based on the numbers of federally-affected students that they serve. Impact Aid is allocated as a function of the number of federally-affect students, not based on the number of LEAs affected.

In this setting, it makes little sense to allocate Impact Aid based on pupil numbers, but to determine whether a state has equalized spending (and thus is entitled to consider Impact Aid in making state funding allocations) without considering pupil numbers at all. If a school district receives Impact Aid based on how many pupils it serves, a determination whether a state is equalizing funding, and thus can consider that Aid in allocating funds among school districts, necessarily should be based on the state's success in equalizing funding considering all pupils. Yet on petitioners' reading of the statute, the number of pupils in each LEA is irrelevant to the equalization determination. This is simply an absurd way to determine equalization which is focused on equitable treatment for pupils, not school districts which are simply a vehicle for conveying benefits to pupils.

Additional support for the federal definition and goals of equalization is found in other provisions of the relevant statutory context. In the only other provision of Title I of IASA addressing equalization, 20 U.S.C. § 6337, the Secretary is instructed to award certain education finance incentive grants to states based on their fiscal efforts in education funding and their efforts to achieve equity. This provision was enacted in 1994, along with the amendment of section 7709 at issue here. In computing the amount of a grant award, the statute instructs the Secretary to weigh variations in school district spending "according to the number of pupils served by the local educational agency." *Id.* § 6337 (b)(3)(A)(ii)(II).

In fact, in awarding education finance incentive grants under section 6337, Congress explicitly adopts the Secretary's interpretation of section 7709 and provides for special considera-

tion of "a State that meets the disparity standard described in section 222.162 of title 34, Code of Federal Regulations (as such was in effect on the day preceding January 8, 2002)." 20 U.S.C. § 6337(b)(3)(B). By citing this regulatory section, Congress directly incorporated and expressly approved the specific methodology of the Appendix to Subpart K, which petitioners here challenge as inconsistent with § 7709. *See* 34 C.F.R. § 222.162. "The method for calculating the percentage of disparity in a State is in the appendix to this subpart." *Id.* Congress' citation and incorporation of section 222.162 into this closely-related statute is a clear congressional affirmation of the Secretary's methodology. In light of this congressional endorsement of the Secretary's reading of the statute, that reading should be affirmed.

Finally, and critically, the nature of the federal interest in equalization, as reflected in these provisions, militates strongly, and perhaps dispositively, against petitioners' interpretation of the statute. Rather than resulting in equalization, petitioners' interpretation can lead to absurd, unfair and inconsistent results, as the Secretary of Education has explained:

> In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in these States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. at 26,324. Thus, in 1976, the Secretary expressly refused to adopt the interpretation of section 7709 that petitioners now characterize as the statute's sole possible reading, finding that "basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States." *Id.*

This case reveals that the result feared by the Secretary is not merely a hypothetical concern. New Mexico is a state with a high proportion of small districts, and petitioners' reading of the statute excludes an insignificant fraction of the pupil population, does not exclude anomalous characteristics, and results in a finding that the State does not equalize. This Court has routinely recognized that statutory interpretations that lead to absurd, irrational or counter-productive results are strongly disfavored. *See, e.g., United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *United States* v. *Turkette*, 452 U.S. 576, 580 (1981) (citing *Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 643 (1978)). Since section 7709 can readily be interpreted to avoid these consequences – consequences expressly identified by the Secretary as unfair and inconsistent – there is no reason to interpret the text to produce such results.

In this statutory context and in light of the federal interests, it makes little sense to interpret section 7709, as petitioners do, to evaluate equalization based solely on variations in LEAs' average revenues without any consideration of the number of students served by each LEA. In contrast, the Secretary's interpretation of section 7709 takes this critical variable into account in calculating disparities and determining equalization. Its reading is the only one that harmonizes the text and the statutory context and purposes.

C. The Chronology Of Section 7709's Enactment Demonstrates That The Secretary's Interpretation Is Correct And That Congress Did Not Alter The Secretary's Disparity Test.

The chronology of events that led to the amendments of the statute at issue here is strong evidence that the statute means what the Secretary says that it means. Specifically, the history of this provision reveals that in 1994, Congress simply adopted the Department's proposed text for 20 U.S.C. § 7709, and therefore that Congress's intent was essentially the De-

partment's intent. There is no indication in the legislative record that Congress was rejecting or disapproving the long-standing disparity test for determining equalization – indeed, that would have been remarkable given that the text was drafted and proposed by the Department itself. Congress simply accepted without change or special consideration the recommendation of the Department in an area of its expertise. Indeed, since 1994 and the Secretary's adoption of his implementing regulations, Congress has *reauthorized* this language, implicitly accepting the Department's interpretation as valid.

The legislative history of section 7709 is sparse, but two facts are both indisputable and clear. The language that became 20 U.S.C. § 7709 was the subject of a specific request to Congress by the Department of Education, and Congress did not amend the Department's proposed text in any way material to the provision at issue in this case.[22] The Department requested that Congress codify one of its three long-standing equalization certification tests and eliminate the other two regulatory options for determining equalization. Congress granted the Department's request and passed the Department's legislation into law.

Succinctly, when Congress promulgated the current statute in 1994, it adopted the Department's position that the disparity test should be the sole standard for determining equalization under 20 U.S.C. § 7709(b). Not only did Congress accept the Department's position, it even adopted the Department's proposed language. Congress's sole intent was to

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[22] Comparing section 7709's language in both the House and Senate versions of the Department's Proposal (which were identical), the sole changes to the Department's requested language were: (1) the phrase "fiscal year preceding the FY for which the determination is made" was added in section 7709(b)(2)(A) to clarify the meaning of "second preceding fiscal year"; and (2) the final law added "or below the 5th percentile" in section 7709 (b)(2)(B)(i).

adopt and implement the proposed bill that constituted the Department's intent.

This Court has routinely considered the fact that a statute is enacted at the request of, and as proposed by, the Executive Branch when interpreting that statute. *See, e.g., Kosak v. United States*, 465 U.S. 848 (1984) (considering report of Special Assistant to the Attorney General who had drafted the FTCA provision at issue); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977) (considering Department of Justice assessment of Title VII in construing one of its provisions); *United States v. Clark*, 445 U.S. 23 (1980) (considering report of the executive branch's Committee on Federal Staff Retirement Systems in interpreting the Civil Service Retirement Act as amended at the Committee's request). And, where as here, the *drafter's* bill itself is enacted into law, its interpretation of that law is entitled to even greater weight. *See also, e.g., BankAmerica Corp. v. United States*, 462 U.S. 122 (1983) (considering testimony of Louis Brandeis, adviser to President Wilson and drafter of proposed legislation); *United States v. Vogel Fertilizer Co.* , 455 U.S. 16 (1982) (giving "great weight" to Treasury Department views because of its role in drafting and explaining statute); *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976) (considering views of executive branch drafter Tommy Corcoran); *Labor Board v. Servette*, 377 U.S. 46 (1964) (considering Administration bill that became relevant provision of the NLRA); *NLRB v. Iron Workers*, 434 U.S. 335 (1978) (same).

New Mexico submits that in light of the chronology of events that led to the enactment of the text at issue, and specifically the enactment of a law drafted by the Department, the inference that the text bears the meaning attributed to it by the Department is inescapable. In addition, this chronology makes absolutely plain that petitioners' argument – that the 1994 amendments constitute a sea-change or dramatic

rejection of the Department's disparity test for determining equalization – is flatly wrong.

Finally, New Mexico fully recognizes that legislative silence is a tool of statutory interpretation that must be used cautiously. Nonetheless, it is noteworthy that on petitioners' view of the statute, Congress made a dramatic change in the Impact Aid program, rejecting the long-established disparity test of the Department and enacting an entirely new test without ever clearly stating that it was doing so.

State equalization of funding is a complex matter that involves consideration of many independent factors. The component of state equalization at issue in this case sits within a myriad of complex, highly technical regulations related to the administration of the federal Impact Aid program. Had Congress intended the radical change supported by petitioners, "some express statement of that intention would surely have appeared" somewhere in the amendments themselves or in the record of events surrounding the enactment. *Zahn v. International Paper*, 414 U.S. 291, 302 (1973). None did. An exhaustive review of the legislative history of the 1994 amendments reveals no such discussion. This history belies petitioners' claim that Congress intended to "reject[ed] the Secretary's 1976 equalization formula." (*See* Pet. Br. at 24.)

Equally to the point, on petitioners' reading of the statute, Congress *sub silentio* discarded long-standing practice *and* adopted an interpretation of the statute that the Secretary had expressly *rejected*. Specifically, in 1974, in promulgating proposed regulations to implement the Impact Aid program, the Commissioner of Education was asked whether the number of pupils or the number of school districts should be considered when determining the 95th and 5th percentile exclusions. After considering the methodology to be used, the Commissioner responded that the percentiles should be determined on the basis of numbers of pupils and not on the

basis of numbers of districts. As noted *supra*, the Commissioner reasoned that:

> [B]asing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

See 41 Fed. Reg. at 26,323-24 (emphasis added).

Thus, petitioners ask this Court to believe that the Department of Education proposed, and Congress without explanation adopted, a statute that determined equalization under a method that the Secretary of Education had rejected as unfair and inconsistent. This simply is not plausible on the undisputed facts that led to the enactment of this law.

Finally, despite recent reauthorizations of the Impact Aid Program and thus opportunities to amend the statute or express concern about the Department's implementation, Congress has expressed no concern about the regulatory administration of 20 U.S.C. § 7709(b). For example, in October 2000, Congress reauthorized the overall Impact Aid statute without altering or commenting on the disparity standard whatsoever. *See* Impact Aid Reauthorization Act of 2000, Pub. L. No. 106-398, 114 Stat. 1654A-368 (2000). Most recently, the 107th Congress amended the Impact Aid law as part of the No Child Left Behind Act, Pub.L. No. 107-110, 115 Stat. 1425 (Jan. 8, 2002). Once again, no changes were made in the statutory provisions at issue in this case. When Congress "re-enacts a statute without change," it is "is pre-

sumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation." *Cf., e.g., Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (citing numerous cases). None of these points by themselves would disprove petitioners' reading, but in combination, they clearly demonstrate that the proposed reading is wrong.

Together, the origin of the statutory text, its enactment as proposed by the Department, and Congress's silence concerning the Department's implementation of the Impact Aid program strongly support the Secretary's interpretation and, indeed, suggest that it most accurately embodies Congress's intent. In light of this chronology, the Secretary's interpretation of section 7709 is plainly reasonable.

II. BECAUSE THE SECRETARY'S REGULATION REASONABLY INTERPRETS § 7709, THAT READING IS ENTITLED TO DEFERENCE.

As petitioners appear to recognize, once it is acknowledged that the statutory text is susceptible of more than one interpretation, the only remaining question is whether the Secretary's interpretation falls within the range of "permissible" meanings under *Chevron*, 467 U.S. at 842-43.

Courts award a significant degree of deference to administrative agencies in applying the second prong of the *Chevron* test. In cases, such as this one, where the relevant statute is "ambiguous", courts are generally required to defer to the agency's interpretation if it is "based on a permissible construction of the statute." *Id.* at 843. The agency's construction need only be "rational and consistent with the statute." *See NLRB* v. *United Food and Commercial Workers*, 484 U.S. 112, 123 (1987). An agency's interpretation of a statute must be upheld "unless procedurally defective, arbitrary or capricious in substance, or manifestly contrary to the statute." *Mead*, 533 U.S. at 227. It is "axiomatic that the [agency's] interpretation of [the statute] for which it has

primary enforcement responsibility need not be the best one by grammatical or any other standards. Rather the [agency's] interpretation of ambiguous language need only be reasonable to be entitled to deference." *EEOC* v. *Commercial Office Products Co.*, 486 U.S. 107, 115 (1988). "[D]eference is particularly appropriate on this type of technical issue of agency procedure." *Id.* at 125 (O'Connor, J., concurring).

Because the regulations at issue, including the Subpart K Appendix, are reasonable and permissible interpretations of the statute, the regulations at issue are entitled to deference under the *Chevron* test and should be upheld.

As set forth *supra* at 25, a per-pupil expenditure or revenue is an average number. It is not the amount actually spent on any given pupil, an amount which would be impossible to calculate in any meaningful way. It is roughly the total amount expended by an LEA divided by the number of pupils in that LEA. Each and every student in an LEA and in a state may be treated as having his or her own "per-pupil" expenditure or revenue amount. The statute reasonably permits the Secretary's methodology which: (i) assigns a per-pupil expenditure or revenue number to every student in every school district in the state, (ii) identifies the per-pupil expenditure or revenue value at the 95th and 5th percentiles of that data set – to wit, the list of all students each with his or her assigned expenditure or revenue amount; and then, and only then, (iii) identify and disregard the LEAs that include the pupils above the 95th and below the 5th percentile of those identified per-pupil expenditure and revenue values.[23]

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[23] The statutory phrase "with per-pupil expenditures or revenues above . . . or below" describes which LEAs must be disregarded in completing the disparity determination. Therefore, in order to determine which LEAs will be disregarded, a mandatory prerequisite is a determination of the number that constitutes the State's per-pupil expenditures or revenues at the 95th and 5th percentiles of the data set.

In New Mexico, during the time at issue, there were approximately 317,777 pupils in the state and thus there were 317,777 per-pupil revenues in the state. The statute directs the Secretary to determine the 95th and 5th percentile marks of that data set of 317,777 per-pupil expenditures, and then to exclude all LEAs with students above the 95th and below the 5th percentile. The disparity calculation thus ignores those LEAs whose pupils are outside of these percentile marks. Again this is a two step process, first identifying the location of the relevant percentiles within the ranking of all per-pupil revenues, and then identifying and eliminating the LEAs that fall at that point.

The critical difference between the two approaches lies in the parties' different interpretations of the statutory language "per-pupil expenditures and revenues." Petitioners interpret this phrase to mean the single value amount that represents what each LEA spends on the average on each pupil, and thus finds the 95th and 5th percentile of a data set that is a list of LEAs ranked in order of average revenues and expenditures.[24] But, the phrase may be interpreted to mean a list of all students with their corresponding per-pupil revenue amounts. (Indeed, the statute does refer to per-pupil revenues and expenditures in the plural.) The Secretary's process ultimately considers the entire universe of per-pupil expenditures for the state. Inasmuch as each per-pupil revenue is represented by one student, this process ranks all of the per-pupil expenditures or revenues and then eliminates the LEAs

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[24] Insofar as petitioners attack the Secretary's method for looking to percentiles of numbers of students, the petitioners' method can be attacked for looking to percentiles of number of LEAs. Technically, both approaches might be less than linguistically perfect because the statute requires looking to percentiles of per pupil revenues. Understanding the meaning of percentile and that it corresponds to a data set, the main difference, again, is which data set can be used. The statute does not preclude either option.

which, aggregately, have up to 5% of the per-pupil expenditures or revenues in the state at both the top and the bottom of the ranking. Thus, the LEAs that represent the 5% of the per-pupil revenues at each extreme are excluded for purposes of the disparity determination, as directed by the statute.[25] Put differently, petitioners assert that the only possible interpretation of the statute requires the state to focus on the singular amount that each LEA expends on pupils on average, even though the statute refers not to each LEA's average spending but to all "such expenditures or revenues in the State."[26]

The Secretary considers the full range of "such expenditures or revenues in the state" by including the per-pupil revenue amounts that correspond to every student ("per-pupil") in the state – not just the amount of the average per-pupil revenue level for each LEA in the state. The appendix language could have referred to the "per-pupil revenues" instead of population. However, the process used is correct because a "pupil" (the ranking measurer, or data set, named in the appendix) – always corresponds to a "per-pupil revenue" (the ranked values named by the statute). Thus the flaw, if

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[25] Petitioners' interpretation of the statute is the same as that of Judge O'Brien in the dissenting opinion below. He too would limit the data set to the number of LEAs statewide, while the alternative interpretation of the statute considers the full data set of per-pupil expenditures or revenues statewide, a number of values based upon student population.

[26] Petitioners imply that the number of per-pupil expenditures or revenues statewide must be limited to the number of LEAs within a state. This is incorrect. For each pupil attending school in any LEA in a state, there is a corresponding per-pupil expenditure or revenue. In order to comply with the statutory requirement that all "per-pupil revenues or expenditures…in the state" be considered, the Secretary must consider the full data set of "such revenues and expenditures," a set that would be equal in number to student population. For example, in New Mexico, for FY 2000, the number of per-pupil revenue values in petitioners' data set would be 89, while under the alternative interpretation of the text, the data set would consist of 317,777 values.

any, is imprecision of language but not of process or result. Accordingly, application of the Secretary's process achieves the same results as the application of the state's statutory interpretation set forth above. Thus, the Secretary's interpretation of the statute is a permissible one under *Chevron*.

Even accepting Judge O'Brien's position that an EXCEL formula is the final authority on how to calculate a percentile, the EXCEL formula for determining the 95th and 5th percentiles can be applied to either petitioners' proposed data set or to the data set composed of all pupils' per-pupil revenues.[27] Applying the EXCEL formula to the full data set (as opposed to the data set advocated by petitioners), the end result is identical to the results reached by the Secretary's formula.[28]

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[27] Judge O'Brien simply cited EXCEL's percentile function without any explanation of what that function actually does. To shed light on this method, the EXCEL percentile formula is an algorithm. Once the data set is selected, you must find the kth smallest member in the array of values, where:

k = [(percentile/100) * (n – 1)] + 1

n = number of values in the array

percentile = the value between 0 and 100 depending on which percentile you want to find

If the result is such that k is not an integer, truncate the result and store the fractional portion (f) for use later in the algorithm. The final step of the algorithm will be to interpolate between the kth and the (k+1)th smallest values:

OUTPUT = a[k] + (f * (a[k + 1] – a[k])

Where: a[k] = the kth smallest value

a[k + 1] = the (k + 1)th smallest value

The output figure is the resulting value at the selected percentile.

[28] Applying the EXCEL percentile algorithm Judge O'Brien applied to the limited per-pupil revenue data set to the full per-pupil revenue statewide data set:

n = 317,777 percentile = 95, 5

Clearly, the regulations, in accordance with the statute, require the Secretary to "disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B); 34 C.F.R. § 222.162(a). The Secretary's interpretation excludes such LEAs and is thus undoubtedly "rational and consistent with

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Then, at the 95th and 5th percentiles:

$k = [(95/100) * (317{,}777 - 1)] + 1 = 301{,}888.2$

$k = [(5/100) * (317{,}777 - 1)] + 1 = 15{,}889.8$

$k = 301{,}888$	$k = 15{,}889$
$k + 1 = 301{,}889$	$k + 1 = 15{,}890$
$f = 0.2$	$f = 0.8$

Again, this data set includes all per-pupil revenues statewide, such that every per-pupil revenue in the data set corresponds to a student. The students are ranked by their per-pupil revenue, which varies by the LEA they attend. The next step requires considering the value corresponding to the kth and [k + 1]th data points. In other words, we must consider the kth and [k + 1]th ranked students' corresponding per-pupil revenues. Those values are:

$a[k] = \$3{,}259$	$a[k] = \$2{,}848$
$a[k + 1] = \$3{,}259$	$a[k + 1] = \$2{,}848$

Applying the final step of the algorithm:

$OUTPUT = 3259 + [0.4 * (3259 - 3259)] = 3259$

$OUTPUT = 2848 + [0.8 * (2848 - 2848)] = 2848$

Accordingly, the 95th and 5th percentiles of per-pupil revenues, respectively, fall at $3,259 and $2,848. Having determined the 95th and 5th percentiles of per-pupil revenues statewide, we must then identify the LEAs in each ranking that fall at those percentiles (i.e., the LEAs with per-pupil revenues of $3259 and $2829). Doing so, we identify Peñasco (95th percentile) and Hobbs (5th percentile) respectively. As such, LEAs ranked above Peñasco and below Hobbs - the same results reached under the Secretary's methodology (*See* Pet. App. at 210a-213a) - are disregarded under section 7709(b)(2)(B) before the Secretary applies the 25% disparity test.

the statute," *United Food and Commercial Workers*, 484 U.S. at 123, and "based on a permissible construction of the statute," *Chevron*, 467 U.S. at 843. As such, the regulations are reasonable and the Secretary's decision should be affirmed.

III. THE SECRETARY'S INTERPRETATION OF THE STATUTE, SET FORTH IN HIS REGULATION AND IN THE ADJUDICATION IN THIS CASE IS ENTITLED TO DEFERENCE UNDER *CHEVRON*.

The core of petitioners' argument is that the Secretary's methodology is inconsistent with the statute and fails at step one under *Chevron* analysis. Alternatively and erroneously, however, petitioners assert that the regulation is not lawful or, at the very least, that the regulation should not be considered under the *Chevron* framework. (*See* Pet. Br. at 37.) Petitioners reach these erroneous conclusions based on two equally faulty premises: (1) that the Secretary lacked the "authority" to promulgate regulations implementing 20 U.S.C. § 7709; and, (2) that the regulation lacks the force of law because it was promulgated without public notice and opportunity to comment as provided by formal rule making procedures. Each premise is wrong.

First, petitioners' principal argument that the Secretary lacked authority to promulgate the regulation at issue is that the statutory text forecloses this regulatory choice. This is simply another version of the argument that the statute has only a single meaning, an argument refuted *supra* at 22-26. In any event, Congress plainly delegated to the Secretary authority to issue regulations specifying the process by which a State may be certified as equalizing expenditures. As a general matter, 20 U.S.C. § 3474 expressly authorizes the Secretary "to prescribe such rules and regulations as the Secretary determines necessary or appropriate to administer and manage the functions of the Secretary or the Depart-

ment." More specifically, the statutory provisions at issue in this case expressly call for the Secretary to "mak[e] a determination" and "certif[y]" whether a State equalizes expenditures. 20 U.S.C. § 7709(b)(1) & (b)(2)(B) & (c)(3)(4). In combination, these provisions reflect Congress's decision that the Secretary, as the expert administrator of the Impact Aid program, should have authority to issue regulations implementing that program.

Second, the regulation at issue was exempt from the Administrative Procedures Act's general public notice-and-comment requirements. While notice of proposed rule making is generally required, an exception exists:

> [W]hen the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

5 U.S.C. § 553(b) & (b)(B). The Secretary expressly relied on this exception in waiving formal rulemaking. As clearly stated along with the announcement of the final regulations at issue in this case:

> [T]hese regulations merely reflect statutory changes, remove unnecessary and obsolete regulatory provisions, reorganize and clarify the language of the regulations, and make minor procedural revisions. Thus, the regulations do not establish or affect substantive policy. Therefore, the Secretary has determined with respect to amendments made due to statutory changes that, pursuant to 5 U.S.C. 553(b)(B), publication of a proposed rule is unnecessary and contrary to the public interest, and with respect to the procedural changes that, pursuant to 5 U.S.C. 553(b)(A), public comment is not required.

60 Fed. Reg. 50,773, 50,778 (Sept. 29, 1995).

The Secretary had "good cause" to make this determination. As explained *supra*, the regulation at issue was simply a

clarification of a prior regulation that had been promulgated pursuant to formal rulemaking procedures. In these circumstances, the Secretary reasonably decided that a second round of formal rulemaking was unnecessary. Indeed, because Congress had enacted the precise statutory language proposed by the Secretary, the Secretary reasonably understood the new statutory language to be an affirmation response to the Department's request that Congress eliminate two of the three equalization tests and codify the Department's then 18-year implementation of the disparity test. *See supra* at 9-15, 29-33. Thus, the Secretary amended the regulations at issue to "remove unnecessary and obsolete regulatory provisions" including references to the previous equalization options. 60 Fed. Reg. at 50,778. In doing so, the Secretary correctly concluded that this did not establish or affect substantive policy and that notice and public commenting were unnecessary in accordance with 5 U.S.C. § 553(b)(B). In light of the prior formal notice and comment process on the regulation and the history of enactment of the statutory provision at issue, the Secretary's interpretation of the regulation implementing the statute is entitled to *Chevron* deference.

A federal agency's interpretation of the statute that it administers is entitled to *Chevron* deference when that interpretation is promulgated as part of a formal rulemaking, but agencies are also entitled to deference when they announce a statutory interpretation in the course of an adjudication. Indeed, this Court recently stated that "deference under *Chevron* . . . does not necessarily require an agency's exercise of express notice-and-comment-rulemaking power." *Edelman v. Lynchburg College*, 535 U.S. 106, 114 (2002). An agency can also express its reading of a statute through the formal adjudication of a complaint and, when it does so, that reading is entitled to *Chevron* deference. *See Mead Corp.*, 533 U.S. at 230-31 & n.12. *See also INS v. Aguirre-Aguirre*, 526 U.S. 415, 425 (1999) (adjudication on decision to withhold deportation).

Relevant here, after the Secretary certified New Mexico as equalized in 1999, petitioners exercised their right under the Impact Aid statute to contest the Secretary's determination. *See* 20 U.S.C. § 7711(a). As both the statute and the regulation required, an ALJ conducted an administrative hearing at which all parties appeared, were represented by counsel, and were provided with a full opportunity to present their views. *See* 20 U.S.C. § 7711(a); 34 C.F.R. § 222.165 *et seq*. The ALJ issued an initial decision concluding that New Mexico's program complied with the statutory requirements and that the Department had correctly certified New Mexico as an equalized state under 20 U.S.C. § 7709(b). *See* Pet. App. at 43a-58a. On appeal and after careful review of the ALJ decision, the Secretary affirmed stating, "[T]hose regulations [Appendix of Subpart K] are consistent with the statutory provision they implement." Pet. App. at 40a.

The Secretary's order determining New Mexico was properly certified under section 7709 was a formal adjudication. *See* 5. U.S.C. § 551 (defining "adjudication"); *id.* § 554 (listing the guidelines for an "adjudication"). In the course of that adjudication, the Secretary announced his interpretation of the relevant statutory provisions. This Court has held that where, as here, an agency is charged with the authority to administer and enforce a statute, and the statute dictates that the agency's determinations "shall be controlling," the agency's reading of the statute it administers in the course of an adjudication is entitled to *Chevron* deference. *See Aguirre-Aguirre*, 526 U.S. at 425 ("Based on this allocation of authority, we recognized . . . that the [Bureau of Immigration Appeals] should be accorded *Chevron* deference as it gives ambiguous statutory terms 'concrete meaning through a process of case-by-case adjudication.'"). *See also Christensen v. Harris County*, 529 U.S. 576 (2000) (Scalia, concurring in part and concurring in judgment).

The Secretary is vested, by law, with the authority to hear challenges to an equalization certification, and the statute renders the Secretary's findings conclusive, if supported by substantial evidence. *See* 20 U.S.C. § 7711(a) & (b)(2). The Secretary announced his reading of the statute in his adjudication of New Mexico's status as equalized. Thus, the Secretary's determination that the Subpart K Appendix is consistent with the Impact Aid statute is entitled to *Chevron* deference.

For each of these reasons, petitioners' claim that the Secretary's reading of the statute is not entitled to *Chevron* deference is meritless.

CONCLUSION

For the foregoing reasons, the judgment of the Tenth Circuit Court of Appeals upholding the Secretary's decision should be affirmed.

Respectfully submitted,

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ZUNI PUBLIC SCHOOL DISTRICT NO. 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO.1

Petitioners,

v.

UNITED STATES DEPARTMENT OF EDUCATION, et al.,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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I. THE STATUTE UNAMBIGUOUSLY ESTABLISHES THE METHODOLOGY THE SECRETARY MUST USE IN REDUCING THE FIELD OF LEAS BEFORE APPLYING THE 25% DISPARITY TEST AND DOES NOT PERMIT THE SECRETARY'S EXTRA STEP OF ADJUSTING OR WEIGHTING LEA DATA BY STUDENT POPULATION

A. THE STATUTE UNAMBIGUOUSLY ANSWERS THE "PRECISE QUESTION AT ISSUE" UNDER *CHEVRON* STEP ONE, LEAVING NO ROOM FOR THE SECRETARY'S MODIFICATION

Under step one of the analysis required by *Chevron* this Court must decide "whether Congress has spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the Court as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984).

The Federal Respondents admit that:

> The "precise question at issue" for purposes of *Chevron* step one, 467 U.S: at 842, is whether, when applying the 95th and 5th percentile exclusions set forth in the statute, 20 U.S.C. 7709(b)(2)(B)(i), the Secretary is required to eliminate 5% of the *LEAs* from each end of the spectrum of LEAs as ranked by per-pupil revenues, or instead may eliminate the outlying five percentiles of *pupils* as arrayed by per-pupil revenues.
>
> FRB 19[1]

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[1] Page references to the Federal Respondent's Brief will be shown as FRB [page number]. Page references to the State Respondent's Brief will be shown as SRB [page number].

The Federal Respondent also admits that the disparity comparison required by § 7709(b)(2)(A) is between LEAs in the State, not between individual pupils. FRB 20. Then, ignoring key text from § 7709(b)(2)(A) which informs the meaning of § 7709(b)(2)(B)(i), the Federal Respondent asserts that the "pivotal question" in this case is: "how to identify 'the 95th percentile' and 'the 5th percentile *of* * * * [*per-pupil] revenues in the State*," inserting the bracketed phrase "[*per-pupil*]" in place of the word "such" as appears in § 7709(b)(2)(B)(i). FRB 20. Examination of the full text of these provisions makes clear that the word "such" in the phrase "such expenditures or revenues in the State" as appears in § 7709(b)(2)(B)(i) refers back to the phrase "such per-pupil expenditures made by, or available to, the local educational agency in the State" as used in § 7709(b)(2)(A), rather than to *individual per-pupil* expenditures or revenues in the State.

Section 7709(b)(1) establishes the criterion for determining whether "a State may reduce State aid to a local educational agency" receiving Impact Aid funds as New Mexico has done. That criterion is whether "the State has in effect a program of State Aid that equalizes expenditures for the public education among local educational agencies in the State." (Emphasis added).

The statute then provides at § 7709(2)(A) that:

> . . . a program of State aid equalizes expenditures **among local educational agencies** if . . .**the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State with the highest *such per-pupil expenditures or revenues*** did not exceed **the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational**

> **agency in the State** with the lowest *such expenditures or revenues by* more than 25 percent. (Emphasis added).

Clearly the phrases "such per-pupil expenditures or revenues" and "such expenditures or revenues" as used in § 7709(b)(2)(A) both refer back to the more detailed phrase "the amount of per-pupil expenditures made by, or per-pupil revenues available to, the local educational agen[cies] in the State" as twice appears in that same sentence. That is the grammatical effect of the word "such" when used in these circumstances. Merriam-Webster's Collegiate Dictionary, 10th Ed. (Merriam-Webster, Inc. 2001), p. 1172, definition of "such" ("Such adj. . . 2. of the character, quality, or extent previously indicated or implied"). It simply allows the drafter to make a shorthand reference to a prior phrase without having to repeat the whole prior phrase. *United Airlines, Inc. v. C.A.B.*, 278 F.2d 446, 449 (D.C. Cir. 1960), *vacated on other grds., All American Airways, Inc. v. United Airlines, Inc.*, 364 U.S. 297 (1960) (reference to "such transportation" in § 401(d)(1) of the Federal Aviation Act of 1958 means the "transportation authorized by the certificate" as previously referenced); *Federal Trade Commission v. Bowman*, 248 F.2d 456, 457 (7th Cir. 1957) (reference to "such documentary evidence" in § 9 of F.T.C. Act means any documentary evidence "relating to any matter under investigation" as earlier referenced).

Substituting the prior definitional phrase for the later, shorter versions of that same phrase in § 7709(b)(2)(A), leaves no doubt whose "expenditures and revenues" Congress intended to be compared:

> . . . a program of State aid equalizes expenditures among local educational agencies if . . .*the amount of per-pupil expenditures made by, or per-pupil revenues*

> *available to, the local education agency in the State* with the highest [*such per-pupil expenditures made by or per-pupil revenues available to the local educational agen[cies] in the State*] did not exceed *the amount of such per-pupil expenditures made by, or per-pupil revenues available to, the local educational agency in the State* with the lowest [*such per-pupil expenditures made by or per-pupil revenues available to the local educational agen[cies] in the State*] by more than 25 percent. (Italicized Inserts added).

The statute then tells us at § 7709(b)(2)(B)(i) that "[i]n making a determination under this subsection, the Secretary shall –

> (i) disregard local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of *such expenditures or revenues in the State*." [Emphasis added].

Applying the same grammatical rules as noted above, makes clear that the phrase *"such expenditures or revenues in the State"* in § 7709(b)(2)(B)(i) is simply shorthand for "*such per-pupil expenditures made by or per-pupil revenues available to, the local educational agen[cies] in the State*" as that phrase is used in § 7709(b)(2)(A).

Reading the statute in this manner and concluding it is unambiguous as regards the "precise question" here at issue one simply implements the rule that when interpreting a statute "just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. U.S.*, 508 U.S. 223, 233-234 (1993) (resort to holistic review to find meaning of statute does not mean statute was ambiguous).

Thus, it is clear from the text of § 7709 that the units required to be ranked, eliminated and measured under § 7709

are all LEAs in the State ranked on the basis of the per-pupil expenditures made by them or the per-pupil revenues available to them. The statute does not permit the Secretary to inject an extra step involving "weighting" of that LEA data by student population.[2] The statute contains no ambiguity on this point. The statute cannot permissibly be read to interpret the phrase "such expenditures or revenues in the State" in § 7709(b)(2)(B)(i) as referring to the revenues or expenditures of each of a State's students. (SRB 23-27, 35-41; FRB 21-26)

B. CONGRESS DID NOT AUTHORIZE USE OF A STUDENT POPULATION WEIGHTING FACTOR IN THE IMPACT AID EQUALIZATION FORMULA

The Federal Respondent's alternative argument (Br. at 29) that § 7709 should be read to permit a kind of student population based weighting adjustment – because the Congress expressly required such weighting in calculating an "equity" factor under another statute, the Education Finance Incentive Grant Program ("EFIG"), enacted in a different title to Pub. L. 103-382,[3] – is obviously wrong. The fact that the Congress expressly (and simultaneously) required weighting by student population in the EFIG formula and did not do so in § 7709 supports the opposite inference – that the Congress did not authorize use of student population based weighting adjustment in making the § 7709 calculation as added at step

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[2] As shown in Part II.B., *infra*, Respondents' alternative formulations of the Secretary's methodology (FRB 25 and n.8 and 34; SRB 26-41) which simply performs the required percentile exclusions on the basis of an array of all pupils attributing to each pupil the average expenditures/revenues of the LEAs they attend, fair no better under the statute.

[3] Section 6337(b)(3)(ii)(II) (Supp. III 2003) (and § 6336(b)(3)(B) from the 1994 Act) of the EFIG expressly requires that "the Secretary shall *weigh* the variation between per-pupil expenditures in each [LEA] . . . *according to the number of pupils served by the [LEA].*" (Emphasis added).

2 of the Secretary's formula. *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987):

> The different emphasis of the two standards which is so clear on the face of the statute is significantly highlighted by the fact that the same Congress simultaneously drafted § 208(a) and amended § 243(h). In doing so, Congress chose to maintain the old standard in § 243(h), but to incorporate a different standard in § 208(a).

The EFIG equity formula is used to adjust how much EFIG grant money a district will be eligible to receive. The EFIG uses a totally different equity formula than applies to Impact Aid: "For each State, the Secretary shall compute a weighted coefficient of variation for the per-pupil expenditures of local education agencies in accordance with subclauses (II), (III) and (IV)." The EFIG specifies in great detail how to weight "[B]y number of children" each LEAs data to be used in that formula, by assigning different weights to certain pupils. *See*, § 6336 *et seq.* (as originally codified); *see*, §§ 6337(d)(1)(B)(iii), (d)(2)(B)(iii) and (d)(3)(B)(iii) as subsequently recodified. *Also see*, n.3, *supra*. None of those procedures apply to the Impact Aid equalization formula and the words "weighting," "number of children" or "student population" appear nowhere in § 7709. If the Congress had intended to allow or require comparable "weighting" adjustments using student population data in the Impact Aid equalization formula, it knew how to do this. *I.N.S. v. Cardoza-Fonseca, supra.*

C. REFERENCES IN THE EFIG STATUTE TO THE SECRETARY'S REGULATIONS DID NOT CHANGE THE IMPACT AID FORMULA

Respondents argue (FRB 29; SRB 28) that the 1994 EFIG statute's reference at 20 U.S.C. § 6336(b)(3)(B) (1994) to the

Secretary's old Impact Aid regulations (34 C.F.R. 222.63) – buried in the "Improving America's Schools Act" of 1994 (a 545 page bill) – shows that the Congress has "explicitly" endorsed the Secretary's formula as set out in an appendix to the 1976 Regulations (Pet. App. 97a).

Nothing in the statutory reference to this regulation and nothing in the legislative history called to the Congress' attention that the appendix to the Secretary's regulation contained a student population based weighting adjustment not present in § 8009 of the 1994 Impact Aid amendments (codified at § 7709). Moreover, § 6336(b)(3)(B) borrowed only the 25% disparity standard from the Secretary's regulations to use for EFIG purposes, not the Secretary's methodology as set out in the appendix. *Brown v. Gardner*, 513 U.S. 115, 120-122 (1994) (where record of Congressional discussion preceding reenactment of statute makes no reference to preexisting administrative interpretation and there is no other evidence to suggest that Congress was even aware of an administration's interpretive position the reenactment will not be considered an endorsement of the administrative interpretation); *Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991) ("Where the law is plain, subsequent reenactment does not constitute an adoption of a previous administrative construction"); *Massachusetts Trustees of Eastern Gas & Fuel Associates v. United States*, 377 U.S. 235, 241-242 (1964) (Congressional reenactment has no interpretive effect as endorsement of a regulation where regulation clearly contradicts requirements of controlling statute).

Nor did the later reenactment of this "Special Rule" for EFIG in Title I, §1125A of the No Child Left Behind Act, Pub. L. 107-110, in 2002 (20 U.S.C. §6337(b)(3)(B)), some eight years after § 7709 became law, change its meaning. Section 6337(b)(3)(B) does not mention – much less endorse–

the methodology set out in the appendix to the referenced regulation and that provision was buried in H.R. 1, a massive bill of some 670 pages. The body of the regulation (at 34 C.F.R., Part 222.162, Pet. App. 175a-176a) parrots the statute. The regulation does reference an appendix to the regulation, but again, nowhere was it called to the Congress' attention that the appendix added an extra student population based weighting adjustment to the § 7709 formula. Nor was this called to the Congress' attention anywhere in the legislative history. Hence, Respondents' "reenactment-equals-endorsement" argument should be rejected. *Brown v. Gardner, supra.* Another principle of statutory construction also warrants rejection of that argument. *Mackey v. Lanier Collection Agency and Service,* 486 U.S. 825, 839-840 (1998): ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one").

D. POLICY ARGUMENTS AND EXPERT OPINION DO NOT CHANGE THE STATUTE

Respondents also argue that calculating the disparity percentage by adopting an EFIG-like student population weighting step would be more in line with scholarly opinion "or accepted practice in the field" (FRB 34), pointing to the EFIG formula as the model which they surmise Congress had in mind for the Impact Aid equalization formula.[4] FRB 29

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[4] Significantly, as admitted at FRB 35, n.15, the 1994 EFIG statute Pub. L. 103-382, § 1125A(b)(3)(C), expressly authorized the Secretary "based on the advice of independent education finance scholars" to "revise each State's equity factor to reflect other need-based costs of [LEAs]" or "to incorporate other valid and accepted methods to achieve adequacy of educational opportunity that may not be reflected in the coefficient of variation method." This authority was not retained in the No Child Left Behind Act, 20 U.S.C. §6337(b)(3). In contrast, the 1994 Impact Aid statute, 20 U.S.C. § 7709, gave the Secretary no authority to revise the statutory equalization formula. This refutes Respondents' arguments for

Yet, the Secretary and a wide range of educational experts have levied serious criticism at both the EFIG formula and the Impact Aid equalization formula.[5] GAO Report - School Finance Options for Improving Measures of Effort and Equity in Title I, GAO/HEHS - 96-142 (August 1996) (www.gao.gov/archive/1996/he 96142.pdf).

Many of those experts suggested "that an equity measure would be better if it took into account a large portion of each State's school districts in determining the disparity [under the impact aid formula] in per pupil spending across the State, as the [coefficient of variation, a measure used in the EFIG formula] does." [Emphasis added]. *Id.* at p. 31. This answers Respondents' argument that Petitioners' reading of the statutory formula would unfairly skew the disparity test since it would eliminate fewer LEAs than under the Secretary's formula. FRB 11. Eliminating fewer LEAs provides a better measure of disparity.

II. THE SECRETARY'S FORMULA DOES NOT PASS MUSTER AS A REASONABLE INTERPRETATION OF THE STATUTE UNDER *CHEVRON* STEP TWO

Even if this Court moves to step two under *Chevron*, the Secretary's methodology does not rest upon a reasonable interpretation of the statute, for several reasons. First, as shown in Part I of this Reply, § 7709 cannot be read to permit

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express or implied Secretarial authority to change that formula. *I.N.S. v. Cardoza-Fonseca*, 480 U.S., *supra* at 432.

[5] At page 13 and Appendix VI the GAO sets out the Secretary's criticism that the EFIG formula (which had not yet been implemented in 1996) will "tend to redistribute Title I funds from many high poverty states and school districts" and will have a "devastating impact" on low income districts by diverting funds from the "states and school districts where the needs are greatest." Criticism of the Impact Aid formula appears at page 43.

the ranking and elimination of percentiles of LEAs based on the percentile elimination of pupils. Second, the Secretary was given no authority to tinker with or change the Impact Aid equalization formula. *See*, Pet. Merits Br. at Argument Section F; *see*, fn. 4, *supra*. Third, as shown in Part II.A., *infra*, Respondents' other policy arguments and conflicting rationales demonstrate that Respondents' interpretation deviates from the statute. Fourth, as shown in Part II.B., Respondents' new formulations rest on an interpretation which requires a calculation impossible to perform.

A. RESPONDENTS' OTHER POLICY ARGUMENTS AND CONFLICTING RATIONALES CANNOT SALVAGE THE SECRETARY'S FORMULA

Summarizing Respondents' positions, first the 1994 legislation is not ambiguous and the 1976 regulations are to be found within the language of the statute. But, because the statute does not actually contain the Secretary's formula, they must argue the statute is ambiguous. But, since the Secretary declared that the 1996 regulations were neither interpretive nor rule making, Respondents must return to their initial argument that the statute embodies the regulation. That failing, they argue the Secretary must have been requested by Congress to fill a (non-existent) legislative gap. Respondents' policy arguments and conflicting rationales cannot salvage the Secretary's formula.

1. The 1994 Statute Did Not Incorporate the 1976 Regulation. The State Respondent contends that the 1996 regulations were a "clarification" of the former 1976 regulations (SRB 43) which had been incorporated into the 1994 Act. SRB 2 and 31; FRB 36-37 This rests on their conjecture the Secretary wrote the whole Act and must have intended to incorporate his Regulation. FRB 6. That conjecture is belied by the fact that the Impact Aid portion of

the bill removed the Secretary's authority over the equalization formula.

Moreover, it is clear from 139 Cong. Rec. (October 4, 1993) at p. 23501 that the Congress intended by Section 8009 to make major changes to Impact Aid. The Senate bill analysis states:

> Section 8009. *State consideration of payments in providing State aid.* Proposed section 8009 of the ESEA would govern the relationship of Impact Aid payments to State programs, of aid to education, and would replace current section 5(d) of the Act with a more rational and understandable approach. [Emphasis added] *Id.* at 23502.

Congress intended to make a change, not rubber stamp the 1976 regulations; and, nothing in the statute authorizes the Secretary to add the extra step of eliminating percentiles of pupils in developing the final field of LEAs, as set out in the Appendix to the Secretary's regulations (Pet. App. 184a-185a). Presumably, if this was the Secretary's bill and he intended to achieve what Respondents suggest, the statute would have simply reproduced (or expressly incorporated) this step from the Secretary's Appendix into the statute. It is not there.

2. There is No Ambiguity. Respondents then contend that the 1994 legislation did not contain the 1976 regulations, but is ambiguous and was interpreted by the 1996 regulations. (SRB 4, 18, 19, 22; FRB 19-23, 26, 37). (this was the Secretary's position below, SRB at p. 18). Apparently, the Secretary did not recall that his predecessor enacted the 1996 regulations without public notice-and-comment, announcing pursuant to the APA, that he was not promulgating interpretive regulations (Petitioners' Merits Brief at 29 and 43).

3. Congress Left No "Gap." At SRB 23, the State Respondent then contends that the 1996 regulations fill a "gap" intentionally left by Congress in its 1994 legislation for the Secretary to fill. If the 1996 regulations were filling a "gap," these regulations were by definition not embodied in the 1994 legislation. Otherwise there would be no gap; and, filling a gap does not involve the resolution of an ambiguity. It involves fulfilling a Congressional request. *United States v. Mead,* 533 U.S. 218, 229 (2001); but, no such gap and no such request appear in the 1994 Act.

B. RESPONDENTS' ALTERNATIVE FORMULATIONS OF THE SECRETARY'S FORMULA ARE NOT TENABLE

The fourth reason the Secretary's methodology does not rest upon a reasonable interpretation of the statute is that Respondents' rationale would require using actual per-pupil expenditures or revenues – data they admit does not exist, and data which is not the same as the average per-pupil expenditures/revenues for LEAs called for in the statute. Hence, their interpretation attributes to the Congress an intent to enact a statutory formula that cannot be implemented! Statutory interpretations which lead to "patently absurd consequences," as here, must be rejected. *United States v. Brown,* 333 U.S. 18, 27 (1948) (Rejecting interpretation of statute which would lead to "patently absurd consequences.") The per-pupil revenue or expenditure data attributed to each LEA under the statute are just averages of those revenues and expenditures calculated by taking the total LEA expenditures or revenues for a given year divided by the number of pupils in that LEA.[6] The State Respondents expressly admit this:

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[6] 20 U.S.C. § 7713(2) specifies how to calculate average per-pupil expenditures or revenues for LEAs in order to determine the amount of "per-pupil expenditures made by" them or the "per-pupil revenues

> As set forth *supra* at 25, a per-pupil expenditure or revenue is an average number. It is not the amount actually spent on any given pupil, an amount which would be impossible to calculate in any meaningful way. [Emphasis added]. SRB 36.

Yet. Respondents assert that the Secretary's formula is just another way of running the required percentile exclusions using an array of all students in the State ranked by their individual expenditures/revenues instead of using an array of all LEAs in the State ranked by their expenditures/revenues. FRB 15, n.8; SRB 36-38, n.26. They claim (SRB 38 and n.27) that the Secretary's formula and an Excel percentile calculation using an array of all students in the State ranked in groups of average per-pupil expenditures made by or revenues available to the LEAs they attend (calling this the ranked list of per-pupil expenditures) produce the same answer. That is true, but two wrongs don't make a right. The dispositive point is that both produce a different answer than the statutory formula.

The State Respondent admits that the costs to educate a first grader and the costs to educate a senior are not the same, and this is true both within a given LEA and across LEAs SRB 16 Moreover, the statute at §§ 7709 and 7713(2) only permits the use of an LEA's average per-pupil expenditures or revenues to rank, eliminate and measure those LEAs. *See* n.6, *supra*.

Yet, the State Respondents' Excel version of the Secretary's formula assumes the contrary, simply taking the

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available to" them required by § 7709. Section 7713(2) provides: "The term 'average per-pupil expenditures' means – (A) the aggregate expenditures of all [LEAs] in the State; divided by (B) the total number of children in average daily attendance for whom such agencies provide free public education."

average per-pupil expenditures or revenues for the LEAs which each student attends and repeating that average as many times on the array of students as there are students attending that LEA. This is a nonsense calculation which only serves to illustrate how far from the statute the Secretary's formula has strayed. It also clearly ignores the statutory directive (§ 7709(2)(B)(i), acknowledged in the Secretary's Appendix at step 1(a)(i) (Pet. App. 184a) to array LEAs – not students – to make the percentile exclusion and disparity determinations.

C. ENFORCING THE STATUTE AS READ BY PETITIONERS WILL NOT DESTROY NEW MEXICO'S "EQUALIZED" SYSTEM

The State Respondent contends that Petitioners are bent on destroying New Mexico's "far reaching" equalized operational funding system. This is not so. (SRB 7)

(1) The Impact Aid statutes and regulations allow States to back out special funding. New Mexico has done this. Pet. App. at 214a, *et seq*. Even after this leveling procedure, the disparity between the top district, Mosquero, and the bottom district, Des Moines, is 244%. (Pet. App. at 210a) The disparity between Gallup, tenth from the bottom, and Los Alamos, third from the top, is 96%. The disparity between Roswell, which is ranked 35th from the bottom, and Los Alamos which is third from the top, is 89%.[7] The State has never explained why these disparities occur in a system they claim is equalized.

(2) The Secretary's formula is not preferable. Respondents argue that as a matter of policy the Secretary's

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[7] Roswell's student population and the student population of those LEAs ranked below Roswell comprise almost 50% of the State's student population.

formula is preferable to the statutory formula because eliminating percentiles of pupils focuses upon student population FRB 25; SRB 37-39; but, Impact Aid exists to fund federally impacted LEAs not State educational programs. Section 7709 creates only "a limited exception" to the rule barring States from considering Impact Aid payments" in disbursing State funding. 139 Cong. Rec., *supra* at p. 23502. A system which eliminates 26% of the LEAs from disparity considerations (per the Secretary's formula) is not a desirable policy.[8] *See*, Part I.D., *supra*.

Moreover, LEAs are independent governmental entities in charge of educating children within a distinct geographical area. These LEAs represent rural areas, reservations, villages, farming communities and metropolitan areas. Congress has declared that these units have their own special value. Congress made clear at § 7709 that LEAs are the units which must be used in eliminating the field of LEAs against which the disparity test is to be applied.

Finally, all of those policy arguments should be addressed to the Congress, not to this Court. *See*, Pet. Merits Brief at 46-47.

D. ENFORCING § 7709 WILL NOT GIVE PETITIONERS A WINDFALL AT THE EXPENSE OF NON-IMPACT AID DISTRICTS

Respondents contend that if the impacted LEAs retain their Impact Aid without offset in their State operational funding, they will receive a windfall. Impact Aid is not paid only because a federal presence interferes with an LEA's

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[8] Federal Respondent's argument (FRB 24) that a State could manipulate the number or composition of its LEAs to fool the disparity test is answered by 20 U.S.C. § 7713(9)(B), granting the Secretary authority to disregard LEAs not created for a "legitimate educational purpose."

taxing capability. (*See* Joint Stipulation ¶ 1 Pet. App. at 191a) The statute recognizes that there are special burdens relating in general to the education of Native American children and Indian reservation residents and have made this a matter of specific concern for funding purposes under Impact Aid. *See*, §§ 7701, 7701(2), 7703(a)(1) and (2).

Further, under 20 U.S.C. § 7713(4), maintenance of plant costs are among the permissible uses for § 7703 funds. Districts which have property wealth may raise such funds through taxation or bonding. (§§ 22-25-1 through 22-25-10, NMSA). Zuni's and Gallup's property bases are seriously compromised. This inequality is not accounted for in the State's "equalized" funding system.[9]

Respondents and the *Amici* Non-Impact Aid Districts from New Mexico ("*Amici* Districts") claim that if the Petitioners are successful, this will result in a reduction in operational funding to all of the LEAs. But, Impact Aid payments only amount to 2.6% of New Mexico's educational budget (Pet. App. at 234a-236a) and New Mexico as of October 23, 2006 has large untapped recurring reserves:

> Governor Bill Richardson today announced that a strong and growing economy, bolstered by broad-based job growth, will mean that an additional $576 million in recurring revenues will be available when the Legislature and the Governor put together the budget during the 2007 legislative session. In addition, $913 million is estimated to [be] available for capital outlay projects and other one-time expenditures, such as water infrastructure and economic development initiatives for local communities. An additional $142 million is estimated to be set aside for efforts to

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[9] New Mexico's capital improvement funding formula has been declared to be unconstitutional (Pet. App. 227a).

> modernize schools across the State. (*See*, www.governor.state.nm.us (Newsroom) (Press Releases) (10/23/06))

It is inconceivable that New Mexico would reduce funding to non-Impact Aid LEAs should Petitioners prevail particularly when annual Impact Aid of $50,000,000 is relatively small compared to the "extra" (recurring) money available to the State.

New Mexico can readily fund any reduction of State operational educational funding to the *Amici* Districts that may result from a finding New Mexico is not equalized; and, more importantly, New Mexico has the resources to truly equalize operational educational funding for all New Mexico LEAs and doing so would enable New Mexico to qualify as equalized under the statutory formula.

E. THE *AMICI* DISTRICTS' RETROACTIVITY ARGUMENT IS WRONG

The *Amici* Districts argue that it would be unfair and inequitable to "punish" their reliance on the Secretary's erroneous statutory interpretation; but, Petitioners have not sought to secure retroactive application of the 1994 statute to events occurring before its enactment. *Landgraf v. USI Film Products*, 511 U.S. 244 (1994) (retroactive relief only occurs when relief impairs rights party possessed when he acted); and, when Petitioners timely challenged the Secretary's equalization determination for New Mexico for the 1999-2000 school year under 20 U.S.C. § 7711, they did not seek to invalidate that determination for any prior year. An order correcting the Secretary's determination for that year would not constitute retroactive relief. *Crete Education Association v. The School District of Crete*, 226 N.W. 2d 752 (Neb. 1975) (Lower Court's 1974 ruling on dispute involving 1972-1973 school year was not forbidden "retroactive" relief where

relief was granted for the 1972-1973 school year as pled in the complaint). Petitioners timely challenge to the Secretary's equalization determination for school year 1999-2000 is the only determination presently at issue before this Court. Petitioners similar challenges to the Secretary's equalization determinations for New Mexico for the ensuing years have been stayed pending the outcome of Petitioners challenge to the 1999-2000 determination.

F. THE *AMICI* DISTRICTS' ELEVENTH AMENDMENT ARGUMENT IS WRONG

The *Amici* Districts (tellingly, not the State Respondent) raise an Eleventh Amendment defense,[10] but Petitioners have not sought monetary relief in this proceeding against any party. If Petitioners prevail, the Secretary's decision will be reversed. What, if anything, occurs after that is for another court at another time.[11]

G. THE *AMICI* DISTRICTS' ESTOPPEL ARGUMENT IS WRONG

The *Amici* Districts' estoppel argument for salvaging the

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[10] Eleventh Amendment defenses are not available for school districts in New Mexico because they are not arms of the State. *Duke v. York*, 85 F.3d 649 (10th Cir. 1996); *Daddow v. Carlsbad Municipal School District*, 898 P.2d 1235 (N.M. 1995) *cert. den.*, 516 U.S. 1067.

[11] 20 U.S.C. § 7709(e)(1) and (2) already waive the State's Eleventh Amendment immunity and the State Respondent's voluntary-intervention also waived any such immunity. The State will also be bound under ordinary principles of *res judicata* by this Court's rulings on the issues here decided. *Clark v. Barnard*, 108 U.S. 436, 477 (1883) (State's voluntary intervention in federal proceeding to protect its interests constituted a waiver of Eleventh Amendment immunity)) *cited with approval in, Lapides v. Bd. Of Regents of Univ. System of Georgia*, 535 U.S. 613, 619-620 (2002); *see Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 223, n.5 (1998) (defining *res judicata's* two aspects: (1) claim preclusion and (2) issue preclusion).

Secretary's formula contends that they should be allowed (at the expense of Petitioners) to continue enjoying a financial windfall the Congress never intended them to receive.[12] Moreover, estoppel can never lie against the United States or a federal official to force the continued provision of federal benefits or favorable treatment which only result from a mistake in statutory interpretation to events occurring after the statute became law. *Automobile Club of Michigan v. Commissioner of Internal Revenue,* 353 U.S. 180, 184 (1957) (The doctrine of equitable estoppel is not a bar to the correction by the Commissioner of a mistake of law." and no reliance interest can bar retroactive application of a correct statutory interpretation); *accord, Dixon v. United States,* 381 U.S. 68 (1965); *Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947) (applying same rule to deny estoppel claim to federal crop insurance benefits); *Schweiker v. Hansen,* 450 U.S. 785, 788 (1981) (*per curiam*) (same as to claim for Social Security benefits). *Office of Personnel Management v. Richmond,* 496 U.S. 414, 419-425 (1990) (denying estoppel claim for federal retirement benefits); *Wisconsin v. Udall,* 306 F.2d 790, 793-795 (D.C. Cir. 1962), *cert. den.,* 371 U.S. 969 (1963) (Interior Secretary had authority and duty to stop disbursing federal funds to States under a 20 year old formula based on erroneous statutory interpretation, rejecting States' reliance argument).

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[12] The *Amici* Districts' estoppel argument is misplaced for another reason alone: estoppel can never be invoked against a party who has done no wrong. *Office of Personnel Management v. Richmond, supra* at 421-422 (noting that "affirmative misconduct" is the traditional trigger for invocation of estoppel)." But there is no allegation here - nor could there be - that Petitioners have engaged in any kind of misconduct.

H. THE *AMICI* DISTRICTS' ARGUMENT THAT CONCERN FOR POOR OR MINORITY STUDENTS IN NON-IMPACT AID DISTRICTS SHOULD DETER THIS COURT FROM ENFORCING THE STATUTE IS WRONG

The *Amici* Districts' further argument that some students in certain ethnic or racial groups (or poor students) in their districts will be harmed if Petitioners prevail is likewise unavailing. The Impact Aid equalization formula does not take account of the race or ethnic status or poverty status of students in the various State LEAs against which the statutory formula is to be applied. So, the adverse affect the *Amici* Districts suggest will or might result to non-Impact Aid districts educating those students if Petitioners prevail cannot alter the meaning of the statute nor excuse the Secretary's continued non-compliance with it.[13]

CONCLUSION

The Secretary's formula should be ruled inconsistent with the statute and New Mexico should be declared to not be "equalized" under the statutory formula for school year 1999-2000.

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[13] If these were relevant factors, Petitioner Zuni has the highest percentage of minority students of all NM LEAs (99.2% Native American and .2% Hispanic and Black combined, for a total of 99.4% minority) *see*, Ex. E. to Appendix 4 of the *Amici* Districts' Br., and also has the highest % of students in poverty of all NM LEAs (48.22%) *Id.* at Ex. C. Likewise, Petitioner Gallup-McKinley's school population is 81.7% Native American, 11% Hispanic, .4% Black and .6% Asian, for a total minority student population of 93.6%. *See*, Ex. E to Appendix 4 of the *Amici* Districts' Br. 37.11% of Gallup-McKinley students are impoverished. *Id.* at Ex. C. Thus, if adverse impact on NM LEAs having high percentages of minority students or impoverished students were relevant factors, those factors would weigh in favor of rather than against Petitioners' call for enforcement of the statute as written.

Respectfully submitted,

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279

(5)

No. 05-1508

In The
Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89, et al.,

Petitioners,

v.

DEPARTMENT OF EDUCATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF OF *AMICUS CURIAE* STATE OF ALASKA IN SUPPORT OF THE RESPONDENTS

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INTEREST OF THE *AMICUS CURIAE*

The State of Alaska submits this *amicus curiae* brief in support of the respondents United States Department of Education and State of New Mexico.[1] Alaska has a significant interest in outcome of this case for two reasons:

1. It is one of three states, including respondent New Mexico, that has passed the test of disparity under the federal Impact Aid program at issue in the case, 34 C.F.R. § 222.162, and 34 C.F.R. Pt. 222, Subpt. K, and

2. Its system of equalization would be seriously undermined if the more than $50 million federal impact aid to Alaska were redistributed as proposed by the petitioners.

SUMMARY OF THE ARGUMENT

The State of Alaska urges the court to affirm the October 11, 2001 decision of respondent United States Department of Education[2] and the regulations on which it is based, 34 C.F.R. § 222.162, and 34 C.F.R. Pt. 222, Subpt. K. The Secretary's decision and the regulations are consistent with 20 U.S.C. § 7709.

The federal government provides impact aid to local school districts affected by the presence of federal activity. 20 U.S.C. § 7701. It sets a number of conditions on the distribution of the aid, among them a prohibition against a

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[1] Sup. Ct. R. 37.

[2] Pet. App. at 34a, *ITMO Zuni Public School District, et al.*, Docket No. 99-81-I (Decision of the Secretary of Education, October 11, 2001), 2001 WL 34798131 (EDDS).

state's consideration of federal impact aid in its distribution of state aid. 20 U.S.C. § 7709(a). 20 U.S.C. § 7709(b) provides an exception to the prohibition. The exception applies to states with laws that provide an equalized system of school finance, that is, a system that equalizes the difference between rich and poor districts.

Alaska has an equalized system of school finance that assures that school districts with limited resources, including those without local tax authority, receive equitable state funding. Because Alaska has been certified as an equalized state by the United States Department of Education, it is permitted to consider federal impact aid in its distribution of state aid, and does so. If the Court strikes down the Secretary of Education's equalization formula as the petitioners suggest, Alaska may lose the ability to count federal impact aid against its contribution under § 7709. The paradoxical effect of such a decision would be that Alaska's equalized funding scheme would be undermined by federal impact funding.

The Secretary's application of the regulation should be upheld. The regulation is consistent with its authorizing statute because it best serves both Congressional intent and the equitable distribution of funds in equalized states.

ARGUMENT

I. THE CURRENT EQUALIZATION FORMULA IS CONSISTENT WITH CONGRESS'S INTENT AND THE PURPOSE OF THE IMPACT AID STATUTE

The petitioners' central challenge to the Secretary's decision at issue in this case[3] is that regulations on which it was based: 34 C.F.R. § 222.162, and 34 C.F.R. Pt. 222, Subpt. K, are in conflict with changes that Congress made in 1994 to eligibility provisions of the federal impact programs. To qualify under these provisions, a state must demonstrate that its distribution of state aid is equalized, thus enabling it to consider that impact aid when it distributes state aid.

The petitioners argue that § 7709(b) precludes the Secretary's current regulation. Petrs.' Br. 44. The statute allows a state to eliminate outliers, defined as "local educational agencies with per-pupil expenditures or revenues above the 95th percentile or below the 5th percentile of such expenditures or revenues in the State." 20 U.S.C. § 7709(b)(2)(B)(i).

As noted and fully discussed by the parties, the purpose of the impact aid program is to compensate a state for the effects of federal activity, such as military installations, or lands held in trust (and thus not taxable) for Native Americans or Alaska Natives.

Alaska is a state dominated by lands that fall within these categories. About 60% of Alaska's land – 222 million acres – is federally owned. Another approximately 44 million acres is land set aside under the Alaska Native

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[3] Pet. App. at 34a.

Claims Settlement Act and other federal statutes for Alaska Natives; much of such land is not subject to taxation.[4]

Alaska receives substantial impact aid for its military, trust, and other federally restricted lands, and stands to lose over $50 million of its deductible impact aid, now attributed to equalized districts. Attach. A at 11 (grand total of column W).[5] Ironically, the distribution of these funds directly to local school districts would undermine the equalization of the state's school funding scheme, the very result the equalization statute was designed to avoid. H.R. Rep. 93-805 at 4128-29 (1974).[6]

State education agencies ordinarily are prohibited from using Alaska's method of applying federal impact funds, reducing state aid to local school districts on account of impact aid eligibility. However, if a state has equalized its payments to its local districts, as measured by the Secretary's disparity test, it may count its payments toward its contribution to local districts. The objective of the disparity test is to assure that state funds are equitably distributed, that is, that there are not extreme differences among a state's local jurisdictions.

In 1976, when the Secretary adopted the first set of disparity test regulations, the United States Department

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[4] *See e.g.* Alaska Native Claims Settlement Act § 21, 43 U.S.C. § 1620. Alaska Department of Natural Resources, "Fact Sheet: Land Ownership in Alaska" (March 2000), http://www.dnr.state.ak.us/mlw/-factsht/land_own.pdf, visited December 8, 2006.

[5] Attachment A is Alaska's fiscal year 2005 federal impact aid equalization certification, along with supporting documents. *Cf.* JA at 85-92, a portion of New Mexico's equalization submission.

[6] Report concerning Education Amendments of 1974, P.L. 93-380.

of Education determined that it was necessary and appropriate to eliminate outliers and to do so on a per-pupil basis to avoid inequitable results:

> In regard to the question of pupils versus districts for the percentages used in calculating the disparity standard, it is the Commissioner's view that basing an exclusion on numbers of districts would act to apply the disparity standard in an unfair and inconsistent manner among States. The purpose of the exclusion is to eliminate those anomalous characteristics of a distribution of expenditures. In States with a small number of large districts, an exclusion based on percentage of school districts might exclude from the measure of disparity a substantial percentage of the pupil population in those States. Conversely, in States with large numbers of small districts, such an approach might exclude only an insignificant fraction of the pupil population and would not exclude anomalous characteristics.

41 Fed. Reg. 26320, 26324 (June 25, 1976). These considerations are reasonably related to the objective of the legislation: they assure that state, and federal impact funds are equitably distributed, without disincentive to state and local effort.[7] Nothing in the legislative record suggests that Congress disapproved of this method when it amended the statute in 1994. And indeed, as New Mexico points out in its opposition to the petition for certiorari, Congress reauthorized the statute after the Secretary readopted the regulations retaining the per-pupil method of determining the outliers, thus ratifying the Secretary's

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[7] *Cf. Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984).

action. Resp't N.M. Br. in Opp. to Cert. at 26. *See, e.g., Bob Jones University v. U.S.*, 461 U.S. 574, 591 (1983) (Congress's awareness of regulation denying tax exempt status to racially discriminatory schools and failure to change the regulation after several opportunities to do so ratified IRS interpretation of the law and public policy).

II. THE APPLICATION OF THE SECRETARY'S FORMULA TO THE STATES IS CONSISTENT WITH THE PURPOSE OF THE STATUTE

Like New Mexico, Alaska has an equitable school financing scheme. Under AS 14.17.410, the state requires municipal school districts to contribute a minimum amount, but caps additional local contributions. AS 14.17.410(b)(2). Alaska's scheme provides additional payments for small schools, AS 14.17.450, adjusts for cost differentials, AS 14.17.460; *cf.* 20 U.S.C. § 7709(b)(2)(B)(ii), and provides a block grant for special needs, AS 14.17.420.

The foregoing statutes were enacted for the most part in 1998. However, Alaska has had some form of adjustment for geographic differentials for school districts for many years. AS 14.17.051 (1970) (repealed, § 39, ch. 83, SLA 1998). There has been equalization based on local effort since at least 1988. AS 14.17.021 (1987) (repealed § 39, ch. 83, SLA 1998); AS 14.17.025 (1987) (repealed § 39 ch. 83, SLA 1998).

Alaska considers impact aid under the federal statute by counting 90% of eligible federal impact aid. AS 14.17.410(b)(1).

To determine disparity under 34 C.F.R. Pt. 222, Alaska employs an adjusted average daily membership.[8] The adjustments are based on the statutory factors set out above. Attach. A at 5, 8-11 column S.[9] The revenue per adjusted average daily membership (Attach. A at 6, at 11, column W) in a district is calculated by dividing the district's audited total revenue (Attach. A at 4, at 10, column R) by the adjusted average daily membership (Attach. A, column S). The United States Department of Education has approved the methodology employed in Attachment A[10], and has certified Alaska as equalized since 1988, and through the 1994 statutory changes. Alaska has a long history of significant state funding of schools – it does not have a tradition of reliance solely or even primarily on local taxation. Indeed Alaska's system has been referred to as one of the most equitable in the nation. *Matanuska-Susitna Borough School Dist. v. State*, 931 P.2d 391, 397 n. 8 (Alaska 1997).

Like New Mexico, Alaska, has many small school districts.[11] Thus, as with New Mexico, the application of the

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[8] Average daily membership (or ADM) is defined as aggregate number of full-time equivalent students enrolled in a school district during a student count period divided by the actual number of days that school is in session for the count period. AS 14.17.990(1).

[9] *See* Attach. A, disparity test documentation for FY '05. *See also* "K-12 Public School Operating Fund and Selected Special Revenue Funds" ("FY '05 Revenues"), http://www.eed.state.ak.us/stats/Resources/annual_revenues_05.xls (last visited December 8, 2006) which sets out the revenue per average daily membership, better illustrating that more funds are actually distributed to the smaller, more remote districts, including those without taxing authority under AS 14.08.011-14.08.021, rural education attendance areas.

[10] Attach. A at 15-18.

[11] *See* "FY '05 Revenues," http://www.eed.state.ak.us/stats/Resources/annual_revenues_05.xls, column marked "ADM."

5th and 95th percentiles to school districts instead of to pupils would result in the elimination of only five or six of the state's many school districts with small populations.

Under the petitioners' interpretation of the statute, the anomaly results with either the average daily membership and the adjusted average daily membership: only about four percent of the state's children would be considered outside the disparity test, including the state's boarding school at the bottom, and at the top, the North Slope Borough School District – with a tax base that includes the North Slope oil industry, and Pelican, a tiny school district that has only 11 students.[12] Other unusual districts (for example, Kashunamiut, a district with a single school site, and Valdez, a small district with a unique tax base – the terminal of the Trans-Alaska Pipeline) would not be included as outliers under petitioners' scheme. Under the Secretary's regulation, these *are* treated as outliers, consistent with the Secretary's finding that application of the disparity test on the basis of student numbers more successfully eliminates anomalies and assures uniform application of the test among the states.

The results of the regulations as applied are consistent with a reasonable conception of equalized school funding, both in Alaska and in New Mexico. An example will illustrate how the petitioners' contrary interpretation would severely undermine equalization. Annette Island School District is in the middle of the state's district rankings under the current scheme. Attach. A at 10. Under the petitioners' interpretation of § 7709, the amount listed as "adjusted deductible impact aid" – a significant percentage

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[12] *Id.*

of the school district's total revenue, Attach. A, column N[13], would be added to total revenues, Attach. A, column R. Taking that total $4,258,615 and dividing it by the adjusted average daily membership of the district, 546.58, would increase the revenue per adjusted average daily membership of the district from $5,610 to $7,791.

Another small district, Chatham, similar to Annette Island in that it has no local revenue (Attach. A at 9, column J), would obtain a radically different result.[14] Its deductible impact aid is $217,749. Attach. A at 9, column N. That, added to its audited total revenues and divided by adjusted daily membership, would yield a much smaller increase. Haines School District, with local revenue but only $3,160 in deductible impact aid, similar total revenues and a similar adjusted daily membership, would see little increase, to only $5,641, but as a municipal school district it would be limited by AS 14.17.410(c) in raising additional revenues.

Thus, three districts with similar revenue and adjusted average daily membership would diverge widely in combined impact and state aid. Alaska's statutory equalization would be seriously and substantially undermined, a result directly contrary to the purpose of 20 U.S.C. § 7709(b).

Further, application of the statute in the manner that the petitioners advocate would eliminate all, or all but one,

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[13] Described in Attach. A at 4.

[14] Chatham and Annette Island School Districts are rural education attendance areas not required to make a minimum local contribution under state law.

state from consideration under § 7709. As a result, equitable funding would end. The legislative history suggests that this was not Congress's intent.[15]

CONCLUSION

Amicus curiae State of Alaska respectfully requests the court to uphold the Secretary's decision and regulation, and to adopt the reasoning of the vacated decision of the Tenth Circuit Court of Appeals.

Dated December 14th, 2006.

Respectfully submitted,

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[15] In fact, it suggests to the contrary, that New Mexico, Alaska, and Kansas would continue to be eligible to take federal impact aid into account in the payment of state aid. In a discussion of a state grants provision of the 1994 amendments to federal education law, the conference report refers to the equalization compliance of New Mexico, Alaska, and Kansas as if it were a given. H.R. Rep. 103-761 at 639 (1994) (Conf. Rep.), *reprinted in* 1994 U.S.C.C.A.N. 2901, 2970, discussing Improving America's Schools Act of 1994, P.L. 103-382.

Attachment A

STATE OF ALASKA

Department of Education & Early Development

Office of the Commissioner

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MEMORANDUM NUMBER 2006-17

To: Superintendents
School District Business Managers
/s/ Roger Sampson

From: Roger Sampson, Commissioner

Date: February 22, 2006

Subject: Title VIII – Impact Aid Adjustments Under AS 14.17.410

* *

The purpose of this memorandum is to give you notice that, pursuant to section 8009(c)(1)(b) of Title VIII – Impact Aid, the State of Alaska is requesting permission from the federal government to take impact aid payments into account in determining state aid payments to school districts during the state fiscal year 2007. All school districts receiving impact aid during fiscal year 2007 are subject to such adjustments as provided in AS 14.17.

If you have any questions, please contact Eddy Jeans, Director of School Finance, at 465-8679. Thank you.

cc: Eddy Jeans, Director, Division of School Finance
Mindy Lobaugh, School Finance Specialist

STATE OF ALASKA
Department of Education
& Early Development
Division of School Finance

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February 23, 2006

Catherine Schagh, Director
Division of Impact Aid
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202-6244

Dear Ms. Schagh:

Enclosed is Alaska's disparity submission of fiscal year 2005 data to be used for fiscal year 2007 certification based upon the provisions of 34 C.F.R. 222.62. This information contains spreadsheets along with copies of the refund notification of payments that were electronically transferred to the Alaska LEAs for Impact Aid funds previously withheld during the 2005 school year.

Please accept this letter as formal notice that the State of Alaska, Department of Education & Early Development, intends to consider Impact Aid payments when allocating state aid to schools for the period July 2006 to June 2007. This notice is required under section 8009(c)(1)(A) of Title VIII-Impact Aid, Section 8009(c)(1)(B) requires this notice to be in the form, and to contain information, that the Secretary requires. The state's plan for an equalized education-funding program is located in Alaska Statute

14.17. Please note there are no regulations yet prescribing what information the Secretary wants submitted, but these submissions are made at the direction of USDOE Impact Aid Program staff. If the Secretary desires any other information, he/she should notify the state immediately so the state can fully comply. Additionally, enclosed is a copy of the letter notifying LEAs of the state's intent to consider Impact Aid funds during the Fiscal year 2007 foundation distribution.

The information submitted is accurate and complete to the best of our knowledge. Should you have any questions or require additional information, please contact me at (907) 465-8679.

Sincerely,

/s/ Eddy Jeans
Eddy Jeans
Director
School Finance

EXPLANATION OF FY2005 DISPARITY TEST COMPUTATIONS & WORKSHEETS

PAGES 1, 2 & 3 OF EXHIBIT

Column A *SCHOOL DISTRICT* lists the LEA's in operation during FY2005.

Column B *ACTUAL FY2005 STATE FOUNDATION PAYMENTS* as distributed by the Alaska Department of Education during the 2004-05 school year. These amounts represent state support payments received by the LEA's under provisions of the Alaska Public School Foundation Program. AS 14.17, 34 CFR 222.63(d)(1)

Column C *ADJUSTMENTS BASED ON AUDITS* amounts represent FY2005 state aid due to LEA's based on audited local revenues and adjustments to Impact Aid as directed by the USDOE Impact Aid Office. Amounts are carried forward from page 5 column AA (AMOUNT STATE OWES).

Column D *FY2005 OTHER STATE REVENUE* as reported in the School Operating Fund (general fund) of all LEA audits for the fiscal year tested. Amounts represent all other state revenue not reported under the specific categories above. 34 CFR 222.63(d)(1)

Column E *SUB-TOTAL STATE REVENUE* combines all revenue in columns B, C and D.

Column F *FY2005 CITY/BOROUGH APPROPRIATIONS* as reported in municipal LEA audits for the fiscal year tested. (In Alaska, only cities and boroughs/"municipal governments" have the power of taxation and legal responsibility to support public schools; there are no local appropriations for REAA's.) 34 CFR 222.63(d)(2)

Column G *FY2005 EARNINGS ON INVESTMENTS* as reported in municipal LEA audits for the fiscal year tested.
34 CFR 222.63(d)(2)

Column H *FY2005 OTHER LOCAL REVENUE* as reported in municipal LEA audits for the fiscal year tested. Amounts include all local revenue not reported in columns F, G and I.
34 CFR 222.63(d)(2)

Column I *FY2005 IN-KIND SERVICES* as reported in municipal LEA audits for the fiscal year tested. Amounts represent the value of services provided to the LEA by the municipal government.

Column J *SUB-TOTAL LOCAL REVENUE* combines all revenue in columns F, G, H and I.

Column K *FY2005 OTHER REAA REVENUE* contains revenues received and reported by REAA LEA's in FY2005 audits. Revenues are included as required by 34 CFR 222.63(d).

Column L *FY2005 TUITION FROM STUDENTS* are payments received from students enrolled in any instructional program for which a tuition fee is collected by the district.

Column M *FY2005 TUITION FROM DISTRICTS* are payments received from other school districts enrolled in any instructional program for which a tuition fee is collected by the district.

Column N *ADJUSTED DEDUCTIBLE IMPACT AID* are amounts of Impact Aid funds deducted by the Alaska Department of Education & Early Development during the 2004-2005 school year when determining state aid to LEA's for the year, less adjustments from column C.

Column O *FY2005 OTHER FEDERAL FUNDS* as reported in LEA audits for the fiscal year tested. These are reported federal revenues to the general operating fund which are not restricted as to use by other federal law or regulations.
34 CFR 222.63(d)(4).

Column P *FY2005 OTHER REVENUE* is other sources of Federal revenue which are not classified elsewhere.

Column Q *FY2005 FUND TRANSFERS IN* lists amounts transferred from other school district funds into the school operation fund as reported in LEA audits for FY2005. Such transfers represent revenues to the general operating fund.

Column R *FY2005 AUDITED TOTAL REVENUES* is the total of:
column E – Sub-Total State Revenue
column J – Sub-Total Local Revenue
column K – FY2005 Other REAA Revenue
column L – FY2005 Tuition from Students
column M – FY2005 Tuition from Districts
column N – Adjusted Deductible Impact Aid
column O – FY2005 Other Federal Funds
column P – FY2005 Other Revenue
column Q – FY2005 Fund Transfers In

Column S *ADJUSTED ADM* is calculated by:

1. Taking the aggregate number of full-time equivalent students enrolled during a count period divided by the number of days in the count period as defined in AS 14.17.990.

2. Adjust that number for school size as defined in AS 14.17.450.

3. Multiply it by the district cost factor as defined in AS 14.17.460.

4. Apply the Special Needs & Intensive Services Funding factor of 1.2 as defined in AS 14.17.420(1).

5. Add to this the aggregate number of Intensive Students multiplied by 5.

6. And finally add the aggregate number of correspondence students multiplied by 80% as defined in AS 14.17.420(2) and AS 14.17.430, respectively.

Column T *REVENUE PER ADJUSTED ADM* calculated by dividing column R by column S.

COMPUTATION OF DISPARITY:

The computation of disparity is performed as required by 34 CFR 222.63(a) using the methodology described in the paragraph numbered 1. The computations are displayed in the bottom right corner of page 3. Specifically, the disparity computation is performed as follows:

a. The revenues per adjusted Average Daily Membership (ADM) are ranked in descending order.

b. The 95th and 5th percentiles are identified as follows:

1. Total FY2005 Adjusted ADM are multiplied by 5% to obtain the target number needed to find the 95th and 5th percentiles of the adjusted ADM.

2. Total FY2005 Adjusted ADM are added from the top down until the target number is

reached identifying the LEA at the 95th percentile; it is identified by the word "HIGH."

3. Total FY2005 Adjusted ADM are added from the bottom up until the target number is reached identifying the LEA at the 5th percentile; it is identified by the word "LOW."

c. The amount of revenue per adjusted ADM (column T) for the "LOW" LEA is subtracted from the amount shown for the "HIGH" LEA. The result is divided by the amount shown for the low LEA, yielding the percentage of disparity.

ACTUAL IMPACT AID
DEDUCTED LESS ADJUSTMENTS

PAGE 4 OF EXHIBIT

Column A *SCHOOL DISTRICT* lists the LEA's in operation during fiscal year 2005.

Column U *FY2005 ACTUAL DEDUCTIBLE FEDERAL PL81-874* lists the amounts of Impact Aid funds the Alaska Department of Education deducted when determining state aid to LEA's for the 2004-05 school year.

Column V *ADJUSTMENTS BASED ON AUDITS* lists the amounts representing FY2005 state aid due LEA's based on audited local revenues and adjustments to Impact Aid as directed by the USDOE Impact Aid Office. These amounts are carried forward from page 5 column AA (AMOUNT STATE OWES.)

Column W *ADJUSTED DEDUCTIBLE IMPACT AID (PL81-874)* amounts represent column U less column V.

EXPLANATION OF FOUNDATION AUDITED VS. ACTUAL DATA

PAGE 5 OF EXHIBIT

Column A *SCHOOL DISTRICT* lists the LEA's in operation during fiscal year 2005.

Column X *STATE AID BASED ON AUDITS* lists amounts that *should have been paid* to the LEA's based on audited data.

Column Y *ACTUAL STATE AID PAID* lists the amounts that were *actually paid* to the LEA's during FY2005.

Column Z *AUDITS LESS PAID* represents the difference between column X and column Y.

Column AA *AMOUNT STATE OWES* lists the amounts owed LEA's by the State of Alaska. Amounts are listed in column C, page 1 of the disparity test (adjustments based on audits).

Alaska Department of Education and Early Development 12/12/2006 FILE: DisparityTest_2005.xls
FY2005 Disparity Test
Compiled from Fiscal Year 2005 Audits

A	B	C	D	E	F	G
SCHOOL DISTRICT	ACTUAL FY2005 STATE FOUNDATION PAID	ADJUSTMENTS BASED ON AUDITS	FY2005 Other STATE REVENUE	SUB-TOTAL STATE REVENUE	FY2005 CITY/BOROUGH APPROP.	FY2005 EARNINGS ON INVESTMENTS
NORTH SLOPE	9,289,803	566	0	9,290,369	22,991,968	
PELICAN	404,883	0	4,269	409,152	52,121	1,413
SKAGWAY	824,525	0	15,386	839,911	841,452	520
VALDEZ	3,977,578	5	79,850	4,057,433	4,949,342	19,989
ALEUTIANS EAST	3,444,655	6,835	0	3,451,490	908,556	
CHUGACH	1,908,930	0	0	1,908,930		0
KODIAK	15,355,959	15,017	879,582	16,250,558	7,491,892	
HOONAH	1,475,529	0	0	1,475,529	505,400	5,155
SOUTHEAST ISLAND	3,041,735	0	41,098	3,082,833		0
WRANGELL	2,285,953	50	0	2,286,003	862,007	3,922
UNALASKA	2,407,692	57	54,294	2,462,043	2,270,451	17,397
HYDABURG	767,001	0	3,154	770,155		2,396
YAKUTAT	1,124,399	0	0	1,124,399	388,000	6,462
KENAI PENINSULA	46,467,674	0	69,324	46,536,998	26,788,170	197,556
JUNEAU	24,109,681	0	20,445	24,130,126	18,835,000	
LAKE & PENINSULA	6,146,267	0	62,846	6,209,113	869,253	84,268
HAINES	1,726,634	0	0	1,726,634	1,363,044	2,445
ANNETTE ISLAND	1,317,721	0	0	1,317,721		0
KLAWOCK	1,312,432	5,042	0	1,317,474	297,009	17,037
CRAIG	3,667,606	7,515	2,498	3,677,619	860,278	10,854
ANCHORAGE	227,384,902	61,152	408,484	227,854,538	133,412,722	1,496,977
MAT-SU	81,777,454	0	0	81,777,454	33,928,357	
CHATHAM	2,030,356	0	0	2,030,356		0
SITKA	7,448,961	0	0	7,448,961	4,787,292	
KETCHIKAN	11,530,586	3	0	11,530,589	7,106,968	2,183
IDITAROD	4,253,299	0	34,301	4,287,600		0
KAKE	1,219,900	1,610	4,320	1,225,830	170,000	7,538
CORDOVA	3,074,466	39	0	3,074,505	1,333,000	482
FAIRBANKS	73,252,725	0	1,450,000	74,702,725	36,545,700	
YUKON FLATS	4,454,522	0	74,029	4,528,551		0
BRISTOL BAY	1,154,967	0	0	1,154,967	600,308	2,990
DENALI	4,469,672	0	0	4,469,672	1,250,000	10,718
SOUTHWEST REGION	6,756,535	0	0	6,756,535		0
PETERSBURG	3,894,437	0	0	3,894,437	1,655,469	12,482
NORTHWEST ARCTIC	21,078,927	0	0	21,078,927	3,215,493	129,047
ALEUTIAN REGION	1,064,031	0	15,939	1,079,970		0
GALENA	15,986,233	0	227,038	16,213,271	25,000	18,690
BERING STRAIT	16,637,274	0	0	16,637,274		0
DILLINGHAM	4,159,419	15,991	0	4,175,410	1,000,000	26,937
NOME	6,055,521	0	13,734	6,069,255	1,420,577	7,523
NENANA	4,002,980	0	0	4,002,980	73,183	1,968
LOWER KUSKOKWIM	38,155,539	0	671,330	38,826,869		0
KUSPUK	4,600,598	0	0	4,600,598		0
YUPIIT	4,261,258	0	80,460	4,341,718		0
ALASKA GATEWAY	4,940,741	0	77,802	5,018,543		0
TANANA	1,056,230	0	0	1,056,230	22,692	283
PRIBILOF	1,189,523	0	7,901	1,197,424		0
LOWER YUKON	18,024,480	0	0	18,024,480		0
KASHUNAMIUT	2,548,283	0	0	2,548,283		0
YUKON-KOYUKUK	9,957,634	0	0	9,957,634		0
SAINT MARY'S	1,859,327	784	0	1,860,111		7,309
DELTA GREELY	7,989,114	0	0	7,989,114		0
COPPER RIVER	5,964,425	0	0	5,964,425		0
Z MT. EDGECUMBE	1,630,642	0	0	1,630,642		
TOTALS	$734,921,618	$114,666	$4,298,083	$739,334,367	$316,820,704	$2,094,541

Alaska Department of Education and Early Development 12/12/2006 FILE: DisparityTest_2005.xls
FY2005 Disparity Test
Compiled from Fiscal Year 2005 Audits

A	H	I	J	K	L	M	N
SCHOOL DISTRICT	FY2005 OTHER LOCAL REVENUE	FY2005 IN-KIND SERVICES	SUB-TOTAL LOCAL REVENUE	FY2005 OTHER REAA REVENUE	FY2005 TUITION STUDENTS	FY2005 TUITION DISTRICTS	ADJUSTED DEDUCTIBLE IMPACT AID
NORTH SLOPE	48,225	563,910	23,604,103	0			2,052,369
PELICAN	3,071		56,605	0			0
SKAGWAY	1,314		843,286	0			0
VALDEZ	49,850		5,019,181	0			1,256
ALEUTIANS EAST	25,209	225,450	1,159,215	0			277,122
CHUGACH	0		0	64,922			144,289
KODIAK	243,434	840,548	8,575,874	0			897,393
HOONAH	58,930		569,485	0			113,213
SOUTHEAST ISLAND	0		0	139,474			34,639
WRANGELL	13,291	29,000	908,220	0			4,027
UNALASKA	36,214		2,324,062	0			6,586
HYDABURG	26,532	65,000	93,928	0			64,472
YAKUTAT	10,425	28,000	432,887	0			78,935
KENAI PENINSULA	318,521	6,956,437	34,260,684	0			0
JUNEAU	198,579		19,033,579	0			0
LAKE & PENINSULA	321,120		1,274,641	0			262,798
HAINES	10,553		1,376,042	0			3,160
ANNETTE ISLAND	0		0	127,305			1,192,174
KLAWOCK	23,407		337,453	0			171,489
CRAIG	189,437	111,423	1,171,992	0			100,491
ANCHORAGE	2,485,733		137,395,432	0	24,317		6,435,081
MAT-SU	140,285		34,068,642	0			0
CHATHAM	0		0	45,172		850	217,749
SITKA	41,606		4,828,898	0			8,959
KETCHIKAN	10,885	530,238	7,650,274	0			4,554
IDITAROD	0		0	148,769			618,641
KAKE	5,745	110,000	293,283	0	2,951		111,210
CORDOVA	6,610	33,000	1,373,092	0			11,792
FAIRBANKS	464,871		37,010,571	0			6,490,660
YUKON FLATS	0		0	56,471			1,200,083
BRISTOL BAY	5,946	321,271	930,515	0			303,089
DENALI	3,075		1,263,793	0			7,232
SOUTHWEST REGION	0		0	482,803			2,451,849
PETERSBURG	36,084		1,704,035	0			0
NORTHWEST ARCTIC	426,683		3,771,223	0	333,058		2,264,786
ALEUTIAN REGION	0		0	19,586			189,211
GALENA	488,217	434,172	966,079	0	5,164		68
BERING STRAIT	0		0	1,701,968			6,693,025
DILLINGHAM	154,966		1,181,903	0			282,825
NOME	189,772		1,617,872	0			41,658
NENANA	337,567		412,718	0			0
LOWER KUSKOKWIM	0		0	528,075			10,359,531
KUSPUK	0		0	95,529			1,373,318
YUPIIT	0		0	49,375			1,608,053
ALASKA GATEWAY	0		0	42,475			300,287
TANANA	29,042		52,017	0		3,922	13,193
PRIBILOF	0		0	17,231			546,574
LOWER YUKON	0		0	534,420			6,606,365
KASHUNAMIUT	0		0	34,263			1,310,972
YUKON-KOYUKUK	0		0	82,279			1,215,841
SAINT MARY'S	42,174	20,689	70,172	0			1,898
DELTA GREELY	0		0	81,330			25,010
COPPER RIVER	0		0	84,996			267,516
Z MT. EDGECUMBE			0	0			801,052
TOTALS	$6,447,373	$10,269,138	$335,631,756	$4,336,443	$365,490	$4,772	~~$57,166,495~~

Alaska Department of Education and Early Development 12/12/2006 FILE: DisparityTest_2005.xls
FY2005 Disparity Test
Compiled from Fiscal Year 2005 Audits

A	O	P	Q	R	S	T	
SCHOOL DISTRICT	FY2005 OTHER FEDERAL FUNDS	FY2005 OTHER REVENUE	FY2005 FUND TRANSFERS IN	FY2005 AUDITED TOTAL REVENUES	ADJUSTED ADM	REVENUE PER ADJ. ADM	
NORTH SLOPE	0	330,021		35,276,862	4,331.00	8,145	
PELICAN	2,000	6,928		474,685	66.30	7,160	
SKAGWAY	2,000	8,643		1,693,840	252.70	6,703	
VALDEZ	12,118	21,931		9,111,919	1,409.10	6,466	
ALEUTIANS EAST	364	883,209		5,771,400	892.69	6,465	
CHUGACH	0	222,175		2,340,316	368.42	6,352	7,320
KODIAK	0	472,565		26,196,390	4,377.60	5,984	HIGH
HOONAH	0	65,544		2,223,771	372.73	5,966	
SOUTHEAST ISLAND	258,056	133,272		3,648,274	615.82	5,924	
WRANGELL	454,280	44,268		3,696,798	626.02	5,905	
UNALASKA	2,000	6,358		4,801,049	815.94	5,884	
HYDABURG	0	35,162		963,717	163.98	5,877	
YAKUTAT	0	27,283		1,663,504	286.89	5,798	
KENAI PENINSULA	0	435,323		81,233,005	14,210.70	5,716	
JUNEAU	37,676	17,156		43,218,537	7,614.72	5,676	
LAKE & PENINSULA	0	470,603		8,217,155	1,449.69	5,668	
HAINES	0	41,365		3,147,201	558.48	5,635	
ANNETTE ISLAND	339,228	90,013		3,066,441	546.58	5,610	
KLAWOCK	0	20,477		1,846,893	329.74	5,601	
CRAIG	3,455	94,340		5,047,897	902.52	5,593	
ANCHORAGE	386,895	666,671		372,762,934	66,966.48	5,566	
MAT-SU	168,778	268,398		116,283,272	20,898.86	5,564	
CHATHAM	252,669	176,049		2,722,845	489.57	5,562	
SITKA	16,824	39,887		12,343,529	2,220.18	5,560	
KETCHIKAN	21,299	50,140		19,256,856	3,468.42	5,552	
IDITAROD	0	213,361		5,268,371	955.96	5,511	
KAKE	0	50,578		1,683,852	305.80	5,506	
CORDOVA	0	31,580		4,490,969	824.02	5,450	
FAIRBANKS	99,358	255,646		118,558,960	21,779.03	5,444	
YUKON FLATS	0	222,410		6,007,515	1,106.21	5,431	
BRISTOL BAY	0	27,501		2,416,072	448.25	5,390	
DENALI	2,000	113,487		5,856,184	1,097.80	5,334	
SOUTHWEST REGION	0	1,002,972		10,694,159	2,005.31	5,333	
PETERSBURG	7,148	19,553		5,625,173	1,062.92	5,292	
N WEST ARCTIC	0	1,192,946		28,640,940	5,416.02	5,288	
ALEUTIAN REGION	2,802	15,650		1,307,219	247.49	5,282	
GALENA	0	213,304		17,397,886	3,296.97	5,277	
BERING STRAIT	0	1,690,047		26,722,314	5,080.64	5,260	
DILLINGHAM	6,061	61,798		5,707,997	1,087.85	5,247	
NOME	6,820	25,588		7,761,193	1,503.84	5,161	
NENANA	0	80,939		4,496,637	887.67	5,066	
LOWER KUSKOKWIM	0	2,380,109		52,094,584	10,347.39	5,035	
KUSPUK	129,182	350,854		6,549,481	1,300.94	5,034	
YUPIIT	0	386,824		6,385,970	1,278.16	4,996	
ALASKA GATEWAY	0	219,540		5,580,845	1,118.55	4,989	
TANANA	12,131	46,893		1,184,386	237.83	4,980	
PRIBILOF	5,080	83,622		1,849,931	378.07	4,893	
LOWER YUKON	0	913,151		26,078,416	5,363.86	4,862	LOW
KASHUNAMIUT	19,646	138,255		4,051,419	840.43	4,821	7,315
YUKON-KOYUKUK	0	441,841		11,697,595	2,433.25	4,807	
SAINT MARY'S	0	6,397		1,938,578	409.24	4,737	
DELTA GREELY	17,745	80,701		8,193,900	1,745.24	4,695	
COPPER RIVER	0	29,731		6,346,668	1,357.13	4,677	
Z MT. EDGECUMBE	0	0		2,431,694	529.55	4,592	
TOTALS	$2,265,615	$14,923,059	$0	$1,154,027,997	208,680.54		

5%	HIGH	5,984
10,434.03	LOW	4,862
	DIFF	1,122
	DISPARITY	23.08%

App. 12

ALASKA DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT
FY2005 DISPARITY TEST
COMPILED FROM FISCAL YEAR 2004 AUDITS

A	U	V	W
SCHOOL DISTRICT	Actual Deductible Impact Aid	Adjustments Based on Audits	Adjusted Deductible Impact Aid
ALASKA GATEWAY	300,287	-	300,287
ALEUTIAN REGION	189,211	-	189,211
ALEUTIANS EAST	270,287	6,835	277,122
ANCHORAGE	6,373,929	61,152	6,435,081
ANNETTE ISLAND	1,192,174	-	1,192,174
BERING STRAIT	6,693,025	-	6,693,025
BRISTOL BAY	303,089	-	303,089
CHATHAM	217,749	-	217,749
CHUGACH	144,289	-	144,289
COPPER RIVER	267,516	-	267,516
CORDOVA	11,753	39	11,792
CRAIG	92,976	7,515	100,491
DELTA GREELY	25,010	-	25,010
DENALI	7,232	-	7,232
DILLINGHAM	266,834	15,991	282,825
FAIRBANKS	6,490,660	-	6,490,660
GALENA	68	-	68
HAINES	3,160	-	3,160
HOONAH	113,213	-	113,213
HYDABURG	64,472	-	64,472
IDITAROD	618,641	-	618,641
JUNEAU	-	-	-
KAKE	109,600	1,610	111,210
KASHUNAMIUT	1,310,972	-	1,310,972
KENAI PENINSULA	-	-	-
KETCHIKAN	4,551	3	4,554
KLAWOCK	166,447	5,042	171,489
KODIAK	882,376	15,017	897,393
KUSPUK	1,373,318	-	1,373,318
LAKE & PENINSULA	262,798	-	262,798
LOWER KUSKOKWIM	10,359,531	-	10,359,531
LOWER YUKON	6,606,365	-	6,606,365
MAT-SU	-	-	-
NENANA	-	-	-
NOME	41,658	-	41,658
NORTH SLOPE	2,051,803	566	2,052,369
NORTHWEST ARCTIC	2,264,786	-	2,264,786
PELICAN	-	-	-
PETERSBURG	-	-	-
PRIBILOF	546,574	-	546,574
SAINT MARY'S	1,114	784	1,898
SITKA	8,959	-	8,959
SKAGWAY	-	-	-
SOUTHEAST ISLAND	34,639	-	34,639
SOUTHWEST REGION	2,451,849	-	2,451,849
TANANA	13,193	-	13,193
UNALASKA	6,529	57	6,586
VALDEZ	1,251	5	1,256
WRANGELL	3,977	50	4,027
YAKUTAT	78,935	-	78,935
YUKON FLATS	1,200,083	-	1,200,083
YUKON-KOYUKUK	1,215,841	-	1,215,841
YUPIIT	1,608,053	-	1,608,053
ZMI EDGECUMBE	801,052	-	801,052
	57,051,829	114,666	57,166,495

ALASKA DEPARTMENT OF EDUCATION & EARLY DEVELOPMENT
FY2005 DISPARITY TEST
COMPILED FROM FISCAL YEAR 2005 AUDITS

A	X	Y	Z	AA
SCHOOL DISTRICT	State Aid Based on Audits	Actual State Aid Paid	Audits Less paid	Amount State Owes
ALASKA GATEWAY	4,940,741	4,940,741	-	-
ALEUTIAN REGION	1,064,031	1,064,031	-	-
ALEUTIANS EAST	3,451,490	3,444,655	6,835	6,835
ANCHORAGE	227,446,054	227,384,902	61,152	61,152
ANNETTE ISLAND	1,317,721	1,317,721	-	-
BERING STRAIT	16,637,274	16,637,274	-	-
BRISTOL BAY	1,152,885	1,154,967	(2,082)	-
CHATHAM	2,030,356	2,030,356	-	-
CHUGACH	1,908,930	1,908,930	-	-
COPPER RIVER	5,964,425	5,964,425	-	-
CORDOVA	3,074,505	3,074,466	39	39
CRAIG	3,675,121	3,667,606	7,515	7,515
DELTA GREELY	7,989,114	7,989,114	-	-
DENALI	4,469,597	4,469,672	(75)	-
DILLINGHAM	4,175,410	4,159,419	15,991	15,991
FAIRBANKS	73,209,772	73,252,725	(42,953)	-
GALENA	15,986,193	15,986,233	(40)	-
HAINES	1,726,609	1,726,634	(25)	-
HOONAH	1,474,736	1,475,529	(793)	-
HYDABURG	734,696	767,001	(32,305)	-
IDITAROD	4,253,299	4,253,299	-	-
JUNEAU	24,109,681	24,109,681	-	-
KAKE	1,221,510	1,219,900	1,610	1,610
KASHUNAMIUT	2,548,283	2,548,283	-	-
KENAI PENINSULA	46,467,674	46,467,674	-	-
KETCHIKAN	11,530,589	11,530,586	3	3
KLAWOCK	1,317,474	1,312,432	5,042	5,042
KODIAK	15,370,976	15,355,959	15,017	15,017
KUSPUK	4,600,598	4,600,598	-	-
LAKE & PENINSULA	6,140,608	6,146,267	(5,659)	-
LOWER KUSKOKWIM	38,155,539	38,155,539	-	-
LOWER YUKON	18,024,480	18,024,480	-	-
MAT-SU	81,777,454	81,777,454	-	-
NENANA	4,002,980	4,002,980	-	-
NOME	6,055,082	6,055,521	(439)	-
NORTH SLOPE	9,290,369	9,289,803	566	566
NORTHWEST ARCTIC	21,004,975	21,078,927	(73,952)	-
PELICAN	404,883	404,883	-	-
PETERSBURG	3,894,437	3,894,437	-	-
PRIBILOF	1,189,523	1,189,523	-	-
SAINT MARY'S	1,860,111	1,859,327	784	784
SITKA	7,448,951	7,448,961	(10)	-
SKAGWAY	824,525	824,525	-	-
SOUTHEAST ISLAND	3,041,735	3,041,735	-	-
SOUTHWEST REGION	6,756,535	6,756,535	-	-
TANANA	1,041,199	1,056,230	(15,031)	-
UNALASKA	2,407,749	2,407,692	57	57
VALDEZ	3,977,583	3,977,578	5	5
WRANGELL	2,286,003	2,285,953	50	50
YAKUTAT	1,124,276	1,124,399	(123)	-
YUKON FLATS	4,454,522	4,454,522	-	-
YUKON-KOYUKUK	9,957,634	9,957,634	-	-
YUPIIT	4,261,258	4,261,258	-	-
Z Mt. EDGECUMBE	1,630,642	1,630,642	-	-
	734,862,797	734,921,618	(58,821)	114,666

[SEAL] UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND
SECONDARY EDUCATION

May 15, 2006

Honorable Roger Sampson
Commissioner
Alaska Department of Education and Early Development
801 West 10th Street, Suite 200
Juneau, Alaska 99801-1894

Dear Commissioner Sampson:

Enclosed are a certification and related report confirming that Alaska meets the requirements of section 8009(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7709(b)). This means that the State is eligible to consider a portion of Impact Aid payments as local resources in determining State aid entitlements for the period July 1, 2005-June 30, 2006 (fiscal year 2006).

A copy of the certification and report is being sent to all school districts in Alaska to inform them of their right to a hearing.

Sincerely,

/s/ Catherine Schagh
Catherine Schagh., Director
Impact Aid Program

Enclosures

[SEAL] UNITED STATES DEPARTMENT OF EDUCATION
OFFICE OF ELEMENTARY AND
SECONDARY EDUCATION

May 15, 2006

NOTICE OF ACTION UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (20 U.S.C. § 7709(b))

State – Alaska

Period of Certification – July 1, 2005-June 30, 2006

As further described in the enclosed report, we have determined that Alaska is eligible to take into consideration Impact Aid payments in determining State aid to local educational agencies in accordance with section 8009(b) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. § 7709(b)) for the period noted above.

Any local educational agency adversely affected by this action may request, in writing and within 60 days of the receipt of this notice, a hearing under section 8009(c)(3)(B) and 34 C.F.R. § 222.165. A request for a hearing should be sent to: Director, Impact Aid Program, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202-6244.

/s/ Catherine Schagh
Catherine Schagh, Director
Impact Aid Program

Enclosure

REPORT FOR THE YEAR JULY 1, 2005-JUNE 30, 2006 (STATE FISCAL YEAR 2006) UNDER SECTION 8009(b) OF THE ELEMENTARY AND SECONDARY EDUCATION ACT OF 1965 (20 U.S.C. § 7709(b))

State – Alaska

Section I. Background

A. Procedural History

The Commissioner of the Alaska Department of Education and Early Development (State) timely notified the U.S. Department of Education (Department) and all Alaska school districts of the State's intention, under Section 8009(b) of the Elementary and Secondary Education Act of 1965, ("the Act"), to take Impact Aid payments into consideration in the calculation of school aid for the period of July 1, 2005 to June 30, 2006 (State fiscal year (FY) 2006). The notice was by numbered memorandum 2005-11 dated February 11, 2005. The Department received final FY 2004 data from the State in support of the request for certification under section 8009(b) on March 1, 2005.

On July 5, 2005, the Department notified all school districts in the State of their opportunity to request a predetermination hearing concerning the State's request, No district requested such a hearing.

B. State Foundation Formula

The current State school funding program, enacted in 1998 (see HCS CSSB 36 (FIN)(1998)), establishes a formula for disbursing general State foundation aid. Funding for public schools consists of State aid, a required local contribution, and eligible Federal Impact Aid, A district's State aid equals "basic need" minus a required local

contribution and 90 percent of eligible Federal Impact Aid for that fiscal year. Under the formula (Alaska Stet. §§ 14.17.410) "basic need" is a number ("N") multiplied by the "base student allocation," $3,940, see Alaska Stat. § 14.17.470). "N" is the sum of the products of three formulas:

1) the average daily membership (ADM) of all students (except correspondence students), times the applicable district cost factor under Alaska Stat. § 14.17.460, times the special needs factor set out in Alaska Stat. § 14.17,420(a)(1);

2) the ADM of intensive needs students times the intensive needs factor (see Alaska Stat. §14.17.420(a)(2));

3) the ADM of correspondence students times the correspondence factor (see Alaska Stat. § 14.17.430).

In addition, the formula provides for Quality School Funding and the calculation of foundation aid on a "hold harmless" basis.

Section II. Description of Disparity Calculation

A. Disparity Test

A State may take into consideration Impact Aid payments in calculating State aid if the Secretary determines that the amount of per-pupil expenditures or revenues of the local educational agency with the highest per-pupil expenditures or revenues in the State did not exceed the per-pupil expenditures or revenues of the LEA with the lowest per-pupil expenditures or revenues by more than 25

percent. 20 U.S.C.§ 7709(b)(2)(A). Alaska has satisfied this requirement for FY 2006 with the calculated disparity of 20-45 percent.

In making this determination, LEAs with expenditures or revenues above the 95th percentile or below the 5th percentile of such revenues or expenditures in the State are excluded, as required by the statute. *See* 20 U.S.C. 7709(b)(2)(B)(i) and the Appendix to 34 C.F.R. Subpart K. In addition, as required by statute (20 U.S.C. § 7709(b)(2)(ii)), the extent to which the State's program reflects the additional cost of providing free public education in particular types of LEAs or to particular types of students was considered by performing the disparity calculation on an adjusted ADM basis.

B. Fiscal Year 2004 Data in Support of FY 2006 Request

The revenue per adjusted ADM at the 95th percentile is $5,412 (Kodiak), and the revenue per adjusted ADM at the 5th percentile is $4,493 (Lower Yukon). The resulting disparity is 20.45 percent.

Section III. Findings

A. Approval

Based upon final FY 2004 data received by the Department on March 1, 2005, the Alaska State aid formula is certified under section 8009(c)(3) of the Impact Aid statute for FY 2006. The revenue disparity is 20.45 percent, which is within the 25 percent disparity allowed under section 8009(b)(2)(A).

B. Exclusions and Allowable Proportion

The State is certified to take into consideration Impact Aid payments when calculating State aid to districts for FY 2006. The State may not take into consideration the increased payment that results from the use of a weight of greater than 1.0 under subparagraph (B) of section 8003(a)(2) of the Act (children residing on Indian lands) or supplemental payments under section 8003(d) of the Act (children with disabilities) or funds received under section 8003(b)(2) of the Act (heavily impacted LEAs) that are in excess of amounts calculated under section 8003(b)(1) of the Act (Basic Support payments). *See* 20 U.S.C. § 7709(b)(1). The maximum proportion of payments that may be taken into consideration, calculated under section 8009(d)(1) for each LEA, is available upon request from the State.

Report Issued By: /s/ Catherine Schagh May 15, 2006
Catherine Schagh, Date
Director
Impact Aid Program

MOTION FILED
DEC 14 2006

No. 05-1508

In The Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO. 89
AND GALLUP-McKINLEY COUNTY
PUBLIC SCHOOL DISTRICT NO. 1,

Petitioners,

v.

UNITED STATES DEPARTMENT
OF EDUCATION, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE AND BRIEF OF AMICI CURIAE PUBLIC SCHOOL DISTRICTS IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The 54 New Mexico school districts joining in the submission of this brief[1] ("Amici Districts") move for leave to participate as amici curiae. The Amici Districts represent the vast majority of New Mexico's public school student population. In all but 11 of the 89 districts, a decision discarding the 30-year-old administrative practice at issue would decrease the per-student education funding. Petitioner's challenge to equalization, if successful, would require the State of New Mexico to seek another source for approximately $350 million in revenue to achieve the same statewide level of funding New Mexico achieved for fiscal years 1999-2000 through 2005-2006.[2]

Principally, Amici Districts seek to contribute to the Court's understanding of the effect a reversal of the Secretary's certification of New Mexico's plan as "equalized" will have on districts that do not receive Impact Aid. New Mexico's education equalization program has a long and unique history, including a significant reliance on the Secretary's longstanding methodology. That reliance affects the outcome of the dispute over statutory meaning.

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[1] Letters of consent from counsel for the Respondents are on file with the Clerk. Counsel for Petitioners were unable to state their client's consent or opposition to participation by the Amici Districts because of time constraints. None of the counsel for the parties authored this brief in whole or in part, and no one other than the Amici Districts made a monetary contribution to the preparation or submission of the brief. The Amici Districts and their respective enrollments are listed in Appendix A. App. at 1-2.

[2] Petitioners approximate the annual Impact Aid Funding at issue at $50 million, *Pet. Br.* at 4. Petitioners have challenged the Secretary's certification of equalization for each fiscal year since 1999-2000.

New Mexico's equalization program appears to have been certified by the Secretary, using the disparity methodology at issue in this case, in each fiscal year since 1976. The Amici Districts have cooperated with the State in support of its equalization efforts, with many districts sacrificing significant local revenues so that students attending less fortunate districts may be afforded better, more equal educational opportunities. These efforts accord with Congress's purposes in encouraging equalization through the enactment of 20 U.S.C. § 7709 and its amendments.

As a matter of law and policy, Petitioners are incorrect in dismissing the practical impact of their position upon other districts and the State's equalization program as a whole.[3] New Mexico's commitment to equalized funding of education predates any action by Congress in this field. The Court should not be misled into reducing the State's highly complex, technical, and long-term effort at equalizing educational opportunities for New Mexico's students to a hyper-formalistic reading of a single sentence in the Impact Aid statute. To do so belittles the willing participation of the Amici Districts in the State's equalization efforts, discounts the sacrifices the districts with substantial local resources have made for decades, and disregards the profound needs of the less fortunate districts that do not benefit from Impact Aid.

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[3] *See Pet. Br.* at 47 ("Respondents have also argued that allowing the intended beneficiaries of the Impact Aid to receive [it] without penalty will distort the New Mexico equalization funding formula at the expense of the other school districts. This is not a legal argument. It is just another plea that this Court should condone the Secretary's substitution of his judgment for the Congress's judgment on policy issues.").

SUMMARY OF ARGUMENT

Petitioners are mistaken in arguing that the effect of their interpretation of the Impact Aid statute on other districts is an immaterial "plea," with no legal significance. *Pet. Br.* at 47. First, despite New Mexico's uniquely challenging demographics, the history of New Mexico's education program demonstrates an impressive and long-term commitment to equalization in its funding of public education, which comports with the purposes of the Impact Aid program. New Mexico's educational funding program has evolved partially in reliance on the long-standing availability of the credits for Impact Aid challenged by Petitioners in this case. Second, reversal of the Secretary's certification determinations will have profoundly adverse and unfair effects on the districts that do not receive Impact Aid. Third, legislative history confirms that Congress respected and protected the reliance of fund recipients. Fourth, this Court's precedents addressing purported conflicts between statutory language and administrative practice confirm that reliance interests created by longstanding agency interpretations weigh significantly in favor of sustaining the administrative interpretation. Finally, Petitioners' miscalculation of the significance of the effect of their position on the State and other districts distorts Petitioners' notions of available remedies.

ARGUMENT

I. THE HISTORY OF NEW MEXICO'S COMMITMENT TO EQUALIZING EDUCATION SPENDING IN A CHALLENGING DEMOGRAPHIC SETTING DEMONSTRATES RELIANCE ON THE AVAILABILITY OF IMPACT AID CREDITS DETERMINED UNDER THE METHODOLOGY AT ISSUE.

A. New Mexico Has Successfully Confronted Difficult Demographic Challenges To Equalization.

New Mexico faces daunting challenges in equalizing its education funding. New Mexico Public Education Department statistics indicate that, among the states, New Mexico ranks 48th in per capita personal income and 40th in average salaries of public school teachers. *See "New Mexico's Ranking Among the States"* (available at http://www.ped.state.nm.us/div/fin/school.budget/nm.stat.05/index.html) (attached as Appendix B), App. at 3-4.[4] Despite its

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[4] The Court may take judicial notice of statistics compiled by government agencies and made available to the public through the Internet. *See* FED. R. EVID. 201(b)(2) (permitting a court to take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned"). Rule 201 authorizes judicial notice "at any stage of the proceedings." FED. R. EVID. 201(f). Thus, the rules of evidence accommodate judicial notice on appeal of the kinds of demographic and statistical data available through official agency websites presented here. *See, e.g., United States v. Esquivel*, 88 F.3d 722, 727 (9th Cir. 1996) (taking judicial notice on appeal of census data showing the number of Hispanics available for jury duty); *United States ex rel. Dingle v. BioPort Corp.*, 270 F. Supp. 2d 968, 972 (W.D. Mich. 2003) (noting that public records and government documents available on the Internet are not subject to reasonable dispute, for purposes of Rule 201); *Cali v. East Coast Aviation Servs., Ltd.*, 178 F. Supp. 2d 276, 287 n.6 (E.D.N.Y. 2001)

(Continued on following page)

low income and teacher salary rankings, New Mexico ranks 26th in public school revenue per student (for fall enrollment 2003-2004) and 26th in expenditures per student in public elementary and secondary schools for 2004-2005. *Id.* More than 23% of the public school-age students in New Mexico live in poverty. *See "Percent of Population Ages 4 to 17 Living in Poverty By District"* (available at http://www.ped.state.nm.us/div/ais/data/fs/03/05.06.poverty.dist.pdf) (attached as Appendix C), App. at 5. Among New Mexico's school districts, the percentages of school-age children living in poverty range from 2.53% in the Los Alamos school district to 50.34% in the Cuba school district. *Id.* The percentage of school-age children living in poverty in 49 of the 89 school districts is 25% or higher; 23 districts have a poverty rate of over 30% and eight have a poverty rate in excess of 40%. *Id.*

New Mexico school districts vary greatly in enrollment. For the 2005-2006 school year, statewide enrollment was 328,111. *See "Total Student Enrollment by District, School Year 2005-2006"* (available at http://www.ped.state.nm.us/div/ais/data/fs/05/05.06.enroll.dist.pdf (attached as Appendix D), App. at 6. The Albuquerque school district, by far the largest, had 94,566 students. *Id.* The next largest school district, Las Cruces, had approximately one-fourth the enrollment of the Albuquerque district. *Id.* The Mosquero district, the smallest, had 50. *Id.* Five districts (Mosquero, Roy, Corona, Maxwell and Vaughn) had fewer than 100 students; 44 other districts had fewer than 1,000. *Id.* at 6, 7.

(taking judicial notice of online database pages from state governmental agencies).

The ethnic composition of New Mexico's school population also varies considerably from district to district. Of the enrollment population statewide, 31.1% of the students are "Anglo," 54% are "Hispanic," 11.1% are "Native American," 2.5% are "Black" and 1.3% are "Asian." *See* "*Percent of Student Enrollment Ethnic Category by District, School Year 2005-2006*" (available at http://www.ped.state.nm.us/div/ais/data/fs/13/05.06.ethnic.pdf) (attached as Appendix E), App. at 8. The "Anglo" enrollment is more than 50% at 25 of the 89 districts and less than 20% at 26 districts. *Id.* The "Hispanic" enrollment is 50% or more at 43 of the 89 districts, including Albuquerque, and 20% or more at 80 of the districts. *Id.* At 15 districts, "Native American" students comprise 15% or more of the enrollment. *Id.*

Despite these particular challenges, the State and its school districts have developed a long term and successful partnership in their commitment to equalization. This commitment has resulted in the successful certification of the State's plan as "equalized" in each fiscal year since certification became available approximately 30 years ago.

B. The History Of New Mexico's Commitment To Equalization Evidences Its Reliance On The Longstanding Certification Approach.

New Mexico's historical commitment to statewide funding of public education and equalization predates federal initiatives by many decades. Long before Congress enacted the federal Impact Aid program in 1950, or amended the Impact Aid program in 1974 to allow equalized states to credit federal fund against state aid, New Mexico's constitution established the groundwork for school funding equalization, independent of local property tax revenues. It created a current school fund and required annual distributions to

the school districts based upon their proportional shares of the total number of school-age children, with additional distributions made to school districts that remained financially unable to maintain public schools after imposing the maximum local property taxes allowed by law. N.M. Const. art. XII, § 4 (partially repealed Nov. 2, 1971).

In the 1930s, New Mexico took another step in the direction of equalization. It instituted an equalized system of school financing, under which the state distributed to each county the difference between its state-approved budget and the property taxes the county was capable of generating. *See* 1935 N.M. Laws, ch. 66 at § 11; *see also* 1939 N.M. Laws, ch. 209, §§ 6-10. In the 1940s, the legislature revised the system to depend primarily upon the weighted average daily attendance in the various counties, without taking into consideration local property tax revenues. *See, e.g.,* 1941 Laws, ch. 125. Counties that were unable to meet their budgets based upon their own maximum efforts at taxation were eligible for special grants in aid. *See, e.g.*, 1949 N.M. Laws, ch. 126; 1951 N.M. Laws, ch. 85. Variations of this format remained in effect for two decades. *See, e.g.*, 1962 N.M. Laws, ch. 8.

Another phase in the evolution toward an equalized system of education funding occurred in 1963, when the New Mexico legislature addressed persistent inequities in the quality of education around the state by incorporating into the funding mechanism the concept of a minimum program of education for all schools. *See* 1963 N.M. Laws, ch. 310. In addition to weighted per-capita basic support distributions, school districts received minimum support payments if the district's total revenues, including a percentage of all local and federal revenues, were inadequate to meet the minimum program standard. *See id.* at § 10.

In 1968, however, Congress amended the Impact Aid statute to prohibit payments to local school districts in states that took such payments into consideration in determining state aid. *See* Vocational Education Amendments of 1968, Pub. L. No. 90-576, § 305, 82 Stat. 1064 (certified as amended at 20 U.S.C. § 7709(d)); *cf.* Educational and Secondary Education Amendments of 1966, Pub. L. No. 89-750, § 203, 80 Stat. 1191 (reducing Impact Aid payments in proportion to state per-pupil expenditure reductions); *compare id.* with Law of Sept. 30, 1950, § 5, Pub. L. No. 81-874. The New Mexico legislature reacted by replacing minimum support payments with discretionary supplemental distributions based more vaguely upon financial need and local effort. *See* 1969 N.M. Laws, ch. 180, §§ 12, 22. It concurrently appealed to Congress to amend the federal law again. The New Mexico legislature wanted Congress to allow consideration of Impact Aid payments as local resources, to end the "forced frivolous use of state funds for non-essential programs in certain districts," to the detriment of needed financing for a minimal educational program in other districts. 1969 N.M. Laws, House Memorial 24. Congress did so in 1974 for states whose systems of aid were designed to "equalize expenditures" among the local school districts in the state. *See* Educational Amendments of 1974, § 304, Pub. L. No. 93-380, 88 Stat. 484 (formerly codified at 20 U.S.C. § 240(d) (repealed)).

In early 1974, the New Mexico legislature adopted the equalized system of state financing of public education that substantially remains in effect today. For each school district, the State calculates total program costs based on "program units" reflecting average daily membership at various levels of education, and other special conditions.

Compare NMSA 1978, § 22-8-18 (2005) *with* 1974 N.M. Laws, ch. 8, § 8; *Compare* NMSA 1978, § 22-8-25 (2005), *with* 1974 N.M. Laws, ch. 8, § 16. The State guarantees direct payment of each school district's program costs, less a percentage of its local and federal revenues. *Compare* NMSA 1978, § 22-8-18(F) (2005), *with* 1974 N.M. Laws, ch. 8, § 16.

The availability of Impact Aid credits has been an important feature in the evolution of New Mexico's education program toward equalization. In each fiscal year since state credit for Impact Aid payments became available, it appears that New Mexico's program has been certified as "equalized" using the disparity methodology challenged in this case. This history confirms that New Mexico has relied upon Impact Aid credits as an essential component of New Mexico's longstanding policy of collectivizing state education revenue and Congress's intent to make Impact Aid credits available to states like New Mexico.

II. THE CONSEQUENCES OF DISREGARDING THE EXPECTATIONS OF AMICI DISTRICTS AND THE STATE WOULD BE SEVERE AND INEQUITABLE.

The Amici Districts have a significant stake in the outcome of this case because loss of certification would either necessitate a large appropriation from the New Mexico legislature to offset the loss of the Impact Aid credit, or result in the loss of significant operational revenue for a majority of New Mexico's school districts.

Analysis of two recent New Mexico legislative proposals, both rejected, confirm the nature and magnitude of the adverse effect on most school districts (and certainly

the majority of the students in New Mexico's public schools) resulting from a loss of certification. In 2003, the state representative from District 69 (which includes McKinley, Cibola, and San Juan counties) proposed HB 115, entitled "School Funding Formula." *See "New Mexico State Department of Education 2003 Agency Bill Analysis"* (available at http://www.ped.state.nm.us/bill.analysis/2003/hb/hb115.pdf) (attached as Appendix F[5]), App. at 9-14. The bill would have amended NMSA, 1978 § 22-8-25 to reduce gradually the percentage of Impact Aid receipts the state takes credit for in calculating equalization. *Id.* at 10-11. The bill proposed reducing the percentage from 75% to 15% over a period of four years. *Id.*

The bill analysis pointed out that, if enacted, the bill would result in New Mexico no longer qualifying under federal law for Impact Aid credits because New Mexico would no longer meet the disparity test required by federal law. *Id.* at 11-12. The bill analysis identified the fiscal impact of the proposed bill as follows:

> Passage of HB 115 would require the 2004 Legislature to appropriate a projected additional $48,845,000 of general revenue to the [State Education Guarantee] to make up for the loss in Impact Aid credits and thereby maintain current unit rate [expenditures per student]. Otherwise the unit value for all school districts would have to be reduced proportionally to make up the loss to the SEG.-

Id. at 12.

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[5] Printing difficulties prevented the inclusion of tables which accompanied the bill analysis. All of the accompanying tables are available at the Public Education Department's web site, as cited.

The analysis also concluded that, without additional funding, the proposed bill would cause "a majority of the school districts to experience a loss of operational revenue. The affected school districts would have fewer resources to meet their performance measure targets." *Id.*

The analysis included a chart (Table 2) displaying the effect on district operational funds resulting from the loss of Impact Aid credits. The table showed that, of the 89 districts, 76 would suffer annual operational losses, ranging from over $12 million in Albuquerque to $18,385 for Mosquero, based on 2000-2001 program costs. *Id.* at Table 2.

In 2003, the New Mexico legislature also considered HB 637, a bill to "Allow School Districts to Keep Federal Money," which proposed amending NMSA 1978, § 22-8-25 to eliminate the state's ability to take Impact Aid credits. *See "New Mexico Department of Education 2003 Agency Bill Analysis"* (available at http://www.ped.state.nm.us/bill.analysis/2003/hb/hb637.pdf) (attached as Appendix G), App. at 15-20. Analysis of HB 637 also identifies the loss of impact aid credits as harmful to most of the state's school districts. ("Unless the legislature appropriates an additional amount equal to the federal revenues for which credit is taken, most school districts will experience a corresponding decrease in [State Education Guarantee] for operational expenditures."). *Id.* at 17.

The loss of Impact Aid credits would result in anomalous, unwanted inequities. For example, current enrollment in the Gadsden school district is close to enrollment in Petitioner Gallup school district. *See* App. at 8 (Gadsden total enrollment = 14,245; Gallup total enrollment = 13,000). Gadsden's enrollment is 94.6% Hispanic. *Id.* The

Gadsden and Gallup school districts are close in the percentages of school-age children in each living in poverty. *See* App. at 5 (Gadsden = 42.38%, Gallup = 37.11%). Table 2 of the 2003 bill analysis indicates, however, that the loss of Impact Aid credits would cause a $1.8 million loss in annual operating revenue in the Gadsden school district and a $15.4 million increase in annual operating revenue for Petitioner Gallup school district.

Similarly, the Hatch school district and Petitioner Zuni school district have roughly comparable current enrollment, *see* App. at 8 (Hatch total enrollment = 1,556; Zuni total enrollment = 1,585) and poverty rates for school-age children. *See* App. at 5 (Hatch = 45.34%, Zuni = 48.22%). The student population at the Hatch school district is 89.5% Hispanic. *See* App. at 8. Table 2 of the 2003 bill analysis indicates that, if Impact Aid credits were lost, the Zuni school district would experience a $3.7 million increase in annual operating funds, while the Hatch school district's annual operating funds would drop by $234,795.

The loss of Impact Aid credits would harm school funding at many other districts with high poverty rates in the school-age children population and with high percentages of minority students. The funding "losers" would include, for example, the Deming school district. Almost 40% of the school-age children there live in poverty and almost 80% of its students are Hispanic. App. at 5, 8. Another funding "loser" would be the Cobre Consolidated school district, which educates a school age population with over 35% living in poverty. App. at 8. More than 86% of its students are Hispanic. App. at 8. The Lordsburg school district, another funding "loser," also has a student

age population with over 35% living in poverty and more than 86% of its students are Hispanic. App. at 5, 8.

The funding "losers" would also include districts which teach student populations including a significant percentage of Native Americans. These include the Aztec (13.1%), Farmington (30.1%), Bernalillo (41.1%), Bloomfield (33.47%), Jemez Mountain (24.5%), Quemado (13.67%), and Ruidoso (17.1%) school districts. App. at 8. Petitioners are mistaken in urging the Court to overlook these consequences as an immaterial policy "plea." *Pet. Br.* at 47.

III. LEGISLATIVE HISTORY EVIDENCES CONGRESS'S CARE IN AVOIDING ABRUPT, UNEXPECTED CHANGES HARMFUL TO IMPACT AID RECIPIENTS.

Petitioners' suggestion that disregarding the expectations of adversely affected districts comports with Congressional policy also collides with relevant legislative history. 20 U.S.C. § 7709(b)(2), was enacted as part of the Improving America's Schools Act of 1994, P.L. 103-382 (the "1994 Act"), a comprehensive reauthorization of and amendment to over 40 federal education programs. Several provisions of the 1994 Act reflect Congress's concern with protecting school districts ("LEAs") and states against significant losses of expected federal revenues under the Impact Aid program.

For example, Congress extended Impact Aid relating to federal acquisition of real property to acquisitions occurring through fiscal year 1999. *See id.* at § 101, 108 Stat. 3749; *see also* 20 U.S.C. § 7702(a) (2006). LEAs eligible for Impact Aid payments relating to federally connected children under the former provisions of the law,

but not under the revised program, were guaranteed payment in fiscal year 1995 of at least 85% of their 1994 fiscal year amount. *See* Improving America's Schools Act of 1994, § 101, Pub. L. No. 103-382, 108 Stat. 3755. LEAs that remained eligible for such aid were similarly guaranteed a level of funding no less than 85% of the previous year's amount for a five-year period. *See id.* LEAs that had received payments relating to decreases in enrollment of federally connected children under provisions of the former act repealed in 1994 were entitled to a phase-out payment in fiscal year 1995 no less than 85% of their fiscal year 1994 payment. *See id.*; *see also* 20 U.S.C. § 238(e) (repealed).

In contrast, the portions of the 1994 Act dealing with state consideration of Impact Aid in providing state aid have no hold-harmless or phase-in protections.[6] *See* Improving America's Schools Act of 1994, § 101, Pub. L. No. 103-382, 108 Stat. 3764-67. Senator Jeff Bingaman of New Mexico made clear during Senate debates of the 1994 bill that "if my State could not take Impact Aid payments to districts into account in calculating amounts to be paid to local districts for education, the entire equalization system would be undermined and would undoubtedly have to be

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[6] Congress did provide for a phase-in of one aspect of the equalization criteria that plainly served to tighten the equalization standard. The 1994 Act provided that the allowable disparity for equalization certification would be reduced from 25% to 20% by 1998. Congress later withdrew this change prior to implementation. *See* Impact Aid Technical Amendments, § 10, Pub. L. No. 104-195, 110 Stat. 2384 (codified as amended at 20 U.S.C. § 7709(b)(2)(A)). Congress viewed this change as a "delay in the equalization mandate for schools in the States of Kansas and Alaska." *See* Congr. Rec., Sept. 4, 1996, p. H9939. New Mexico's ability to satisfy the lower equalization standard was apparently not in question.

reformulated. That process would be a long one[.]" 140 Congr. Rec. S. 1513 (daily ed. Aug. 2, 1994) (stmt. of Sen. Bingaman). The fact that Congress did not allow time for the states dependent upon the equalization credit to adjust their equalization programs suggests that Congress did not intend to alter the substance of the disparity standards as calculated using the Department of Education's regulations. *Cf.* H. Conf. Rep. No. 103-761, p. 639, *reprinted in* 1994 U.S.C.C.A.N. 2970 (three currently qualifying states).

Two years later, Congress enacted the Impact Aid Technical Amendments. *See* Impact Aid Technical Amendments, Pub. L. No. 104-195, 110 Stat. 2379-84 (Sept. 16, 1996) (codified as amended at 20 U.S.C. § 7709). As stated in the report of the House Committee on Economic and Educational Opportunities, the legislation made clarifying and technical amendments and addressed problems that had national application. H.R. Rep. No. 104-560, at 1 (1995), *reprinted in* 1996 U.S.C.C.A.N. 2894. Continuing its pattern of protecting Impact Aid recipients from sudden and unexpected changes in funding, Congress implemented a hold-harmless provision for Impact Aid relating to federal acquisition of real property, assuring LEAs of at least 85% of their prior fiscal year's payments for the years 1995 and 1996. This grace period gave school districts a longer period of time to adjust to "dramatic shifts in funds among eligible school districts." *See id.*; *see also* Impact Aid Technical Amendments, Pub. L. No. 104-195, 110 Stat. 2379. Significantly, the 1996 technical amendments act did not include any changes relating to the Department of Education's interpretation of the 95th and 5th percentile standard for state equalization plans. *See* Impact Aid Technical Amendments, Pub. L. No. 104-195, 110 Stat. 2379-84.

In 2000, Congress substantially modified the various Impact Aid funding programs, and Congress again extended protections against sudden losses of funds under the program. *See* Floyd D. Spense Nat'l Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, 114 Stat. 1654, 1654A-386-87 (Oct. 30, 2000). For example, it extended the hold-harmless provision relating to Impact Aid for federally connected children into fiscal years 2001 and 2002, limited certain reductions in payments relating to federal acquisition of real property, and assured that a heavily impacted LEA would be eligible for basic support payments in the event of an unexpected ineligibility determination. *See id.* §§ 1803, 1804, 1806 at 1654A-373, 1654A-377. It also ameliorated the problem of eligible LEAs failing to timely apply for Impact Aid payments by giving notice and a 60-day grace period for late applications to fund recipients who had applied in the prior fiscal year. *See id.* at 1654A-382. The only change Congress made to the equalization provisions, however, was to repeal outdated references to the pre-1994 Impact Aid statute. *See id.* at § 1812, 114 Stat. 1654A-386. Similarly, in 2002, Congress made a minor, technical amendment to the equalization provisions of the Impact Aid law while changing the various aid programs substantively. It again extended additional guarantees of continuing payments to funding recipients that lost their eligibility and made special exceptions for specific LEAs that failed to timely file applications for aid. *See* No Child Left Behind Act of 2001, Pub. L. No. 107-110, §§ 801-805 115 Stat. 1425, 1947-56 (Jan. 8, 2002).

The evolution of the Impact Aid program from 1994 to the present demonstrates that Congress did not intend to change the equalization standards of Section 7709(b)(2) in

a way that would suddenly and unexpectedly cause the State of New Mexico to lose the ability to credit Impact Aid as part of its educational funding program. *See, e.g., Lorillard v. Pons,* 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative . . . interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change"); *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 535 (1982) ("Where an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." (internal quotation marks omitted)). Congress repeatedly and consistently protected funding recipients from the catastrophic consequences of a sudden loss of Impact Aid funds. Nothing in the development of this legislative policy indicates that Congress intended to treat qualifying LEAs and states differently in terms of protecting funding recipients from abrupt changes in Impact Aid criteria. Given the care Congress took to safeguard against these consequences when it did make a substantive change in the funding criteria, it is highly unlikely that it intended to create the problem New Mexico will face if its certification is invalidated – the need to suddenly reallocate tens of millions of dollars of state aid.

IV. THE RELIANCE INTERESTS OF AMICI DISTRICTS AND THE STATE WEIGH SIGNIFICANTLY IN FAVOR OF UPHOLDING THE SECRETARY'S LONGSTANDING ADMINISTRATIVE PRACTICE.

Contrary to Petitioners' assertion, *Pet. Br.* at 47, this Court has repeatedly identified the reliance arising from an established administrative practice as a factor weighing significantly against disturbing an agency interpretation. Disregarding the State's (and in turn the Amici Districts') reliance interest under these circumstances would be inappropriate and unprecedented. Several of this Court's decisions illustrate this point. In *Zenith Radio Corp. v. United States,* 437 U.S. 443 (1978), Congress had reenacted the Tariff Act several times without changing the administrative interpretation in dispute. Trading nations and private companies had built significant expectations upon the agency's interpretation. The Court concluded that "[i]n light of these substantial reliance interests, the longstanding administrative construction of the statute should not be disturbed except for cogent reasons." *Id.* at 457-58 (quotation marks omitted).

In *Udall v. Tallman,* 380 U.S. 1 (1965), this Court considered the Secretary of the Interior's interpretation of an executive order and extensive oil and gas development undertaken in reliance on the Secretary's interpretation. *Id.* at 1, 16, 17. The *Udall* opinion explained that:

> It may be argued that while these facts and rulings prove a usage they do not establish its validity. But government is a practical affair intended for practical men. Both officers, law-makers and citizens naturally adjust themselves to any long-continued action of the Executive Department –

> on the presumption that unauthorized acts would not have been allowed to be so often repeated as to crystallize into a regular practice. That presumption is not reasoning in a circle but the basis of a wise and quieting rule that in determining the meaning of a statute or the existence of a power, weight shall be given to the usage itself – even when the validity of the practice is the subject of investigation.

Id. at 17 (quoting *United States v. Midwest Oil Co.*, 236 U.S. 459, 472-73 (1915)).

Other precedents support the "wise and quieting rule" of respecting the expectations arising from longstanding administrative interpretations. *See, e.g., E.I. Du Pont De Nemours v. Train*, 430 U.S. 112, 134-35 (1977) (pointing out that reliance by the states and other affected parties upon the Environmental Protection Agency's interpretation of amendments to the Federal Water Pollution Control Act was among the considerations supporting the agency's interpretation); *Train v. Natural Res. Def. Council,* 421 U.S. 60, 87 (1975) (same); *United States v. Chicago N. Shore & Milwaukee R.R. Co.*, 288 U.S. 1, 14 (1933) (noting that the railroad company and its officers had acted in reliance on the agency's ten-year old, uniform construction of an Interstate Commerce Act provision requiring the agency's authorization to issue securities, and stating that "[a]t this late day, the courts ought not uphold an application of the law contradictory of this settled administrative interpretation."). These principles retain their force in the "*Chevron* era." *See, e.g., Delaware River Stevedores v. DiFidelto,* 440 F.3d 615, 623-24 (3rd Cir. 2006) (Fisher, J., concurring) (stating that the "central insight" of *Midwest Oil,* that weight must be given to the administrative usage itself in the search for statutory

meaning, is "very much at home in the *Chevron* era"); *United States v. Parish of St. Bernard,* 756 F.2d 1116, 1126 (3rd Cir. 1985) (stating that "[w]e would be disputing with the sophists if we doubted for a moment" the presumption, arising from expectations connected with any long continued action of an executive agency, that administrative usage must be given weight in determining the meaning of the statute, as set out in *Tallman* and *Midwest Oil*).

Other features of modern administrative law foster stability and protect reliance on agency interpretations, and this Court presumes that Congress understands these mechanisms. For example, in *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 107 (1991), this Court recognized that it has "long favored application" of common law preclusion principles to final determinations of administrative bodies. Furthermore, the Court acknowledged Congress "is understood to legislate against a background of common-law adjudicatory principles" including those aimed at achieving stability and repose in administrative proceedings. *Id.* at 108; *see also Restatement (2d) of Judgments* § 83 (1982) at 266-67 (describing rule of *res judicata* applicable to administrative adjudications); cmt.b at 268 ("[T]he social importance of stability in the results of [administrative] decisions corresponds to the importance of stability in judicial judgments.").

While no formal rules of administrative *stare decisis* exist, a change in course requires the agency to provide a reasoned analysis. *See, e.g., Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 41-42 (1983); *Gas Trans. Northwest Corp. v. FERC,* 363 F.3d 500, 504 (D.C. Cir. 2004) ("Divergence from agency precedent demands an explanation.") (quoting *Hall v. McLaughlin*, 864 F.2d 868, 872 (D.C. Cir. 1989)). In

Motor Vehicle Mfrs. Ass'n, this Court explained that an agency changing direction by rescinding a rule must explain the change because:

> A settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to.

463 U.S. at 42 (quoting *Atchison, Topeka Santa Fe Ry. v. Wichita Bd. of Trade*, 412 U.S. 800, 807-08 (1973)).

The mechanisms in administrative law which protect reliance on administrative stability are, like *stare decisis*, reflections of a broader principle in the law disfavoring the disturbance of expectations. *See, e.g., Payne v. Tennessee,* 501 U.S. 808, 834-35 (1991) (Scalia, J., concurring) (noting that *stare decisis* is the application to judicial precedents of the "more general principle that the settled practices and expectations of a democratic society should generally not be disturbed by the courts."). Petitioners are thus mistaken in attempting to brush aside the expectations of affected entities, like Amici Districts, adversely affected by a disturbance of the settled expectations connected with the equalization methodology in dispute. *See, e.g., Randall v. Sorrell,* ___ U.S. ___, 126 S.Ct. 2479, 2500-501 (2006) (Alito, J., concurring) (concluding that the petitioners' failure to address *stare decisis* warranted rejection of arguments to overrule *Buckley v. Valeo*, 424 U.S. 1 (1976)).

V. THE COURT SHOULD GRANT NO RETROSPECTIVE RELIEF.

The Amici Districts urge the Court to adopt Respondents' position and uphold the Secretary's certification of New Mexico's program as equalized. If the Court finds the Secretary's certification of New Mexico's equalization plan invalid, Amici Districts request that the Court limit its decision to prospective applications only. Equity and this Court's precedents foreclose prospective relief.

Petitioners only vaguely reveal their objective in this litigation: "Petitioners have shown they were entitled to *retain* their Impact Aid funds for fiscal year 2000, and *for all intervening years* for which New Mexico was not equalized under the statutory formula."[7] *Pet. Br.* at 48. (emphasis added). Implicit in this objective is an expectation that New Mexico should reimburse the State aid that Impact Aid recipients would have otherwise received. *See id.* at 4 ("New Mexico's federally impacted districts are entitled to retain their additional share of approximately $50,000,000 per annum of Impact Aid funds without suffering offsetting reductions in their state provided operational funding.") For the following reasons, such a retroactive remedy would be inappropriate and unprecedented.

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[7] This statement is misleading, in that Petitioners *have retained* all of their Impact Aid funds. Under the certification process, New Mexico has been permitted to reduce *State aid* to Petitioners by 75% of the Impact Aid received. *See* 20 U.S.C. § 7709(1); NMSA 1978, § 22-8-25. New Mexico takes a partial credit for the Impact Aid, rather than the actual funds, as Petitioners suggest.

A. Equity Requires A Prospective Remedy.

In *Brown v. Board of Educ. of Topeka*, 349 U.S. 294 (1955), this Court recognized the importance of equitable principles in fashioning appropriate remedies. "Traditionally, equity has been characterized by a practical flexibility in shaping its remedies and by a facility for adjusting and reconciling public and private needs." *Id.* at 300. Because of the predominant role states and localities play in education and the need for practical flexibility, equity is of particular importance when the Court's decision will significantly affect a state's public education system. *See Milliken v. Bradley*, 418 U.S. 717, 741-42 (1974); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-50 (1973). In sum:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . [L]ocal control over the educational process affords citizens an opportunity to participate in decisionmaking, permits the structuring of school programs to fit local needs, and encourages experimentation, innovation, and a healthy competition for educational excellence.

Milliken, 418 U.S. at 741-42 (quotation marks omitted). The Court's decision and implementation of a remedy in this case will have a far-reaching impact on the State and local control of the education system in New Mexico. As such, an equitable remedy is warranted.

Though this case is not as far reaching as *Brown*, a reversal of the Secretary of Education's certification

decision and a retroactive application will have a profound impact on New Mexico, its funding of public education, and the students who attend non-Impact Aid schools. Petitioners fail to disclose explicitly that their alleged damages for the seven years now at issue (FY 2000 through FY 2006) will be approximately $350,000,000.00. This figure represents approximately 20% of New Mexico's operational expenditures for public education for FY 2006. Requiring New Mexico to pay these money damages would impose catastrophic consequences on the State's educational funding.

As previously discussed, New Mexico's commitment to a policy of equalizing public education funding predates both the equalization exception of 20 U.S.C. § 7709 and Congress's initial policy decision to provide Impact Aid. In sum, for over seventy years, New Mexico has maintained a statewide system for funding public education. Moreover, it has made a good-faith effort to equalize that funding for more than thirty years. Since 1976, New Mexico has followed the Secretary's criteria for certification of its equalization plan. Such adherence to the Secretary's calculation methods was not only reasonable, it was required. *See* 34 C.F.R. § 222.160, Appendix to Subpart K ("Except as otherwise provided in the regulations, these methods are the only methods that may be used in making these determinations."). Absent a finding that the Secretary acted without Congressional authority, the Supremacy Clause precludes the State from unilaterally ignoring federal regulations or agency interpretation of such regulations. *New York v. FCC*, 486 U.S. 57, 63 (1988) ("The phrase 'Laws of the United States' encompasses . . . federal regulations that are properly adopted in accordance with statutory authorization.") In light of this long-term regulatory regime, and the

State's compulsory reliance upon federal regulations, and the Secretary's certification criteria, it would be inequitable to hold New Mexico liable for any retroactive monetary damages sought by Petitioners. *Brown*, 349 U.S. at 300.

B. The Nature Of Congress's Spending Clause Authority Renders Prospective Relief Appropriate.

The Court has long recognized the special considerations which bear upon fashioning a remedy when interpretation of a Spending Clause statute is at issue. *See Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1, 29-30 (1981) ("[R]elief may well be limited to enjoining the Federal Government from providing funds to the [State]"); *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 595-97 (1983) (opinion of White, J.) ("'[M]ake whole' remedies are not ordinarily appropriate in private actions seeking relief from violations of statutes passed by Congress pursuant to its power under the Spending Clause to place conditions on the grant of federal funds."); *Rosado v. Wyman*, 397 U.S. 397, 420-21 (1970) (holding that petitioners were "entitled to declaratory relief and an appropriate injunction by the district court against the payment of *federal* monies according to the new schedule, should the State not develop a conforming plan within a reasonable period of time"). Significantly, the Court has recognized *Rosado* as a rejection of "the suggestion that the courts could require the State to pay the additional sums demanded by compliance with federal standards." *Pennhurst*, 451 U.S. at 29.

These special considerations stem from the nature of federal grants made under Congress's spending power. "[L]egislation enacted pursuant to the spending power is

much in the nature of a contract: in return for federal funds, the States agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 17. Crucial to the legitimacy of Congress's power under the Spending Clause is the State's voluntary and knowing acceptance of the terms of the contract. *Id.* The *Pennhurst* Court explained further:

> There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Id. (citation omitted). As such, this Court has "regularly applied the contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages." *Barnes v. Gorman*, 536 U.S. 181, 184 (2002).

This case presents a particularly complex contractual arrangement between the local educational agencies ("LEA"), the state, and the federal government. In essence, there are two separate, but closely related and interdependent contracts. The first contractual arrangement is between the LEA and the federal government, with the LEA meeting certain conditions in exchange for federal funding. *See* 20 U.S.C. § 7703. If the LEA meets the criteria for the Impact Aid, the state may elect to enter into the second contractual arrangement, by fulfilling the conditions set forth under 20 U.S.C. § 7709. In exchange for creating a certifiable equalization plan, the federal

government allows the state to take credit for the funds sent to the LEA. In turn, the state has more funds available to distribute to all of the school districts.

It is the details of the terms of this second contractual relationship that are at issue in this case. Petitioners argue that the Secretary has invalidly certified New Mexico's equalization plan, and thus the Secretary's certification should be set aside. In doing so, Petitioners essentially seek to demonstrate that the State has not fulfilled the conditions placed upon it by the federal government and therefore should not be allowed to take the credit. They argue that "[i]f New Mexico wants to have the benefits of achieving equalization, it must meet the 25% disparity test under the rules set by Congress. It has not done so." *Pet. Br.* at 47. Absent from this argument, however, is any recognition of the essentially contractual nature of this legislation, and the Secretary's role in setting the terms and conditions of the State's contractual obligations. Even if the Court determines that the Secretary exceeded the authority delegated by Congress and erroneously certified New Mexico in a manner that Congress did not intend, New Mexico cannot be faulted for meeting the certification terms enforced by the Secretary.

Imposing different terms on New Mexico, retroactively, based upon the Court's new interpretation of § 7709 would amount to an improper, unilateral change in contract terms. Petitioners insist that the text of § 7709(b)(2)(B)(i) clearly expressed Congress's intent and gave the State adequate notice of a change. The Court should reject this argument. First, such a contention is untenable, given that Petitioners have now set forth three different methods of calculating the computation called for in § 7709(b)(2)(B)(i). More importantly, even if the State disagreed with the

Secretary's interpretation of § 7709(b)(2)(B)(i), it was not at liberty to ignore it. Petitioners correctly state that "New Mexico is free to equalize its funding or not as it chooses." *Pet. Br.* at 47. As demonstrated above, New Mexico's choice to equalize pre-dates Congress's Impact Aid legislation. New Mexico, however, was not free to choose the method which the Secretary used to certify its equalization plan. The State and Amici Districts should not now be penalized for New Mexico's adherence to the conditions as it reasonably understood them at the time it applied for and received certification. Any such remedy will inevitably have drastically adverse effects on the Amici Districts, which are in essence third-party beneficiaries of the certification process. *Cf. Barnes*, 536 U.S. at 189 (recognizing the rights of third-party beneficiaries to a federal grant).

C. Eleventh Amendment Immunity Precludes A Retroactive Restitution.

The *Pennhurst* Court also noted that "anything but prospective relief would pose serious questions under the Eleventh Amendment." *Pennhurst*, 451 U.S. at 29-30; *see also Hergenreter v. Hayden*, 295 F. Supp. 251, 256 (D. Kan. 1968) (a federal court "cannot constitutionally, under the Eleventh Amendment, decree affirmative relief against the State . . . or attorney fees for plaintiffs or for restitution of past school distribution funds which may have been illegally withheld by defendants."); *Shepheard v. Godwin*, 280 F. Supp. 869, 876 (E.D. Va. 1968) ("A decree [ordering restitution] would be an order to the State to take affirmative political action . . . prohibited by the Eleventh Amendment."). Significantly, the conditioned waiver of Eleventh Amendment immunity under 20 U.S.C. § 7709 is

limited to certain narrowly and clearly defined state violations. *See* 20 U.S.C. § 7709(e)(1)-(2). First, immunity is waived if the state considers Impact Aid payments before obtaining certification from the Secretary. *Id.* at § 7709(d)(2), (e); *see also id.* at § 7709(a), (b)(1). Second, in cases in which the state obtains certification based on projected data and provides assurances of repayment to the affected LEAs, immunity is waived if the final data do not demonstrate conformance with the disparity standard. *Id.* at § 7709(b)(3)(B).

A waiver of a state's Eleventh Amendment Immunity cannot be lightly implied. *College Sav. Bank v. Florida Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999) ("[I]n the context of *federal* sovereign immunity . . . it is well established that waivers are not implied. We see no reason why the rule should be different with respect to state sovereign immunity."); *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 306 (1990) ("Sensitive to the values underlying the Eleventh Amendment, the Court has required that consent to suit in federal court be express"). Nothing in the statute indicates that Congress intended as one of its conditions on the federal grant that a state open itself to liability for any errors the Secretary might commit in determining equalization under 20 U.S.C. § 7709(b)(2)(B)(i). Nothing in the waiver clause references or otherwise mentions the computation section of the statute and nothing indicates that New Mexico knowingly and voluntarily waived its immunity under these circumstances. *College Savings Bank*, 527 U.S. at 682 ("The classic description of an effective waiver of a constitutional right is the intentional relinquishment or abandonment of a known right or privilege.") (quotation omitted).

If the Court invalidates Appendix K, Amici Districts respectfully request that it apply its decision to certification applications post-dating such a ruling. New Mexico's longstanding commitment to equalization and the complex and time-sensitive nature of the State's funding formula and processes require that New Mexico and the Amici Districts be afforded a reasonable opportunity to adjust to any changes to the interpretation of 20 U.S.C. § 7709. Equity and the Court's precedent dictate such a result.

CONCLUSION

The Amici Districts urge the Court to uphold certification of New Mexico's education program as equalized. Alternatively, any remedy granted to Petitioners should be prospective, only.

Respectfully submitted,

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APPENDIX A

AMICI DISTRICTS

	Public School Districts	2005-2006 Enrollment
1.	Albuquerque Public Schools	94,566
2.	Animas Public Schools	291
3.	Artesia Public Schools	3,503
4.	Aztec Municipal Schools	3,244
5.	Capitan Municipal Schools	588
6.	Carlsbad Municipal Schools	6,074
7.	Chama Valley Independent Schools	470
8.	Clayton Public Schools	536
9.	Cloudcroft Municipal Schools	469
10.	Clovis Municipal Schools	8,305
11.	Cobre Consolidated Schools	1,421
12.	Deming Public Schools	5,544
13.	Dexter Consolidated Schools	1,154
14.	Dora Consolidated Schools	231
15.	Elida Municipal Schools	141
16.	Estancia Municipal Schools	919
17.	Eunice Public Schools	575
18.	Farmington Municipal Schools	10,254
19.	Floyd Municipal Schools	253
20.	Fort Sumner Municipal Schools	330
21.	Gadsden Independent Schools	14,245
22.	Grady Municipal Schools	147
23.	Hagerman Municipal Schools	467
24.	Hatch Valley Public Schools	1,556
25.	Hobbs Municipal Schools	7,713
26.	Hondo Valley Public Schools	136
27.	House Municipal Schools	147
28.	Jal Public Schools	421
29.	Lake Arthur Municipal Schools	162
30.	Las Cruces Public Schools	23,911
31.	Logan Municipal Schools	233
32.	Lordsburg Municipal Schools	716

33.	Los Alamos Public Schools	3,628
34.	Loving Municipal Schools	563
35.	Lovington Municipal Schools	2,936
36.	Melrose Public Schools	248
37.	Moriarty Municipal Schools	4,062
38.	Pecos Independent Schools	767
39.	Portales Municipal Schools	2,893
40.	Quemado Independent Schools	214
41.	Reserve Independent Schools	187
42.	Rio Rancho Public Schools	13,611
43.	Roswell Independent Schools	9,342
44.	Roy Municipal Schools	70
45.	Ruidoso Municipal Schools	2,370
46.	San Jon Municipal Schools	162
47.	Santa Fe Public Schools	13,740
48.	Santa Rosa Consolidated Schools	682
49.	Silver Consolidated Schools	3,550
50.	Taos Municipal Schools	3,207
51.	Tatum Municipal Schools	286
52.	Texico Municipal Schools	526
53.	Truth or Consequences Municipal Schools	1,544
54.	Tularosa Municipal Schools	1,043
	Total	**254,353**

APPENDIX B

NEW MEXICO'S RANKING AMONG THE STATES
(Selected Categories)

CATEGORY	RANKING	NEW MEXICO	U.S. AVERAGE
Students Enrolled per Teacher in Public Elementary and Secondary Schools, Fall 2003	26	15.0	15.8
Average Salaries of Public School Teachers, 2004-05	40	$39,391	$47,808
Percent of Revenue for Public Elementary and Secondary Schools (2003-04)[2] from:			
Local Government	50	13.3%	43.5%
State Government	3	69.0%	48.0%
Federal Government	1	17.7%	8.6%
Per Capita Total General Expenditures of State Governments for all Functions, 2001-02	8	$4,975	$3,857
Current Expenditure per Student in Public Elementary and Secondary Schools, Fall (2004-05)[3] Enrollment	26	$8,236	$8,618

Public School Revenue per Student in Fall Enrollment, 2003-04	26	8,992	$9,407
Per Capital Personal Income, 2002	48	$24,228	$30,804

Source: *National Education Association Research's report, Rankings & Estimates:*

Rankings of the States 2004 and Estimates of School Statistics 2005, Fall 2005 Update

[1]This is an average salary for all teachers paid out of the Operational Subfund and from federal funds.

[2]Included here are "receipts" for all public school funds (Operational, Teacherage, Transportation, Food Services, Athletics, Non-Instructional Support, Special Grant Projects, Capital Projects, and Debt Service) and the appropriation for the State Department of Education. "Receipts" excludes non-revenue items such as sale of bonds and property, loans, proceeds from insurance adjustments, abatements, and deferred sick leave accumulation.

[3]The following are included as "current expenditures": Expenditures for administration by the State Board of Education and the State Department of Education, instructional support, student support, operations and maintenance, student transportation, and food services. Excluded are interest on school debt, capital outlay, summer school, and community services.

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PERCENT OF POPULATION AGES 4 TO 17 LIVING IN POVERTY, BY DISTRICT

U.S. CENSUS BUREAU

DISTRICT	POVERTY	POP.	PERCENT
ALAMOGORDO	2,333	10,225	22.82
ALBUQUERQUE	19,031	103,461	18.39
ANIMAS	71	284	25.00
ARTESIA	858	3,512	24.43
AZTEC	507	3,015	16.82
BELEN	1,224	5,575	28.87
BERNALILLO	1,444	4,737	30.48
BLOOMFIELD	731	3,678	19.87
CAPITAN	98	629	15.58
CARLSBAD	1,442	6,245	23.09
CARRIZOZO	72	243	29.63
CENTRAL CONS.	2,879	8,803	32.70
CHAMA	132	529	24.95
CIMARRON	89	540	16.48
CLAYTON	143	589	24.28
CLOUDCROFT	66	499	13.23
CLOVIS	2,398	8,711	27.53
COBRE CONS.	571	1,606	35.55
CORONA	24	88	27.27
CUBA	738	1,466	50.34
DEMING	2,040	5,328	38.29
DES MOINES	24	99	24.24
DEXTER	248	861	28.80
DORA	62	180	34.44
DULCE	244	760	32.11
ELIDA	21	74	28.38
ESPANOLA	1,593	6,987	22.80
ESTANCIA	252	887	28.41
EUNICE	102	581	17.56
FARMINGTON	2,277	11,638	19.57
FLOYD	38	110	34.55
FT. SUMNER	78	313	24.92
GADSDEN	5,277	12,451	42.38
GALLUP	6,296	16,965	37.11
GRADY	20	60	33.33
GRANTS-CIBOLA	1,532	5,466	28.03
HAGERMAN	198	493	40.16
HATCH	705	1,555	45.34
HOBBS	1,757	7,264	24.19
HONDO	67	207	32.37
HOUSE	12	41	29.27
JAL	109	422	25.83
JEMEZ MOUNTAIN	112	317	35.33
JEMEZ VALLEY	237	1,188	19.95
LAKE ARTHUR	37	172	21.51
LAS CRUCES	6,194	22,812	27.15
LAS VEGAS CITY	682	2,415	28.24
LOGAN	38	191	19.90
LORDSBURG	286	805	35.53
LOS ALAMOS	84	3,322	2.53
LOS LUNAS	1,985	9,003	22.05
LOVING	108	427	25.29
LOVINGTON	621	2,655	23.39
MAGDALENA	309	701	44.08
MAXWELL	22	81	27.16
MELROSE	58	251	23.11
MESA VISTA	99	466	21.24
MORA	221	725	30.48
MORIARTY	817	5,263	15.52
MOSQUERO	6	35	17.14
MOUNTAINAIR	150	363	41.32
PECOS	182	932	19.53
PENASCO	147	628	23.41
POJOAQUE	255	1,782	14.31
PORTALES	894	3,052	29.29
QUEMADO	76	218	34.86
QUESTA	150	699	21.46
RATON	326	1,324	24.62
RESERVE	79	264	29.92
RIO RANCHO	658	11,675	5.64
ROSWELL	3,040	10,352	29.37
ROY	12	66	18.18
RUIDOSO	503	2,105	23.90
SAN JON	39	101	38.61
SANTA FE	2,878	17,125	16.81
SANTA ROSA	181	670	27.01
SILVER CITY	894	3,422	26.13
SOCORRO	681	2,145	31.75
SPRINGER	89	431	20.65
TAOS	1,036	3,686	28.11
TATUM	74	297	24.92
TEXICO	78	419	18.62
TRUTH OR CONSQ	621	1,831	33.92
TUCUMCARI	410	1,234	33.23
TULAROSA	579	1,941	29.83
VAUGHN	28	99	28.28
WAGON MOUND	32	159	20.13
WEST LAS VEGAS	646	2,014	32.08
ZUNI	907	1,881	48.22
STATE	85,364	358,921	23.78

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TOTAL STUDENT ENROLLMENT BY DISTRICT * School Year 2005-2006

This is a list of the number of students enrolled in New Mexico public schools on the 40th day of the school year. It was compiled from data submitted by districts on the Accountability Data System (ADS), and is updated annually in January. A list of district size in descending order is printed on the back of this sheet.

DISTRICT	ENROLLMENT	DISTRICT	ENROLLMENT	DISTRICT	ENROLLMENT
ALAMOGORDO	6,489	FLOYD	253	MOUNTAINAIR	375
ALBUQUERQUE	94,566	FORT SUMNER	330	PECOS	767
ANIMAS	291	GADSDEN	14,245	PENASCO	619
ARTESIA	3,503	GALLUP	13,000	POJOAQUE	1,991
AZTEC	3,244	GRADY	147	PORTALES	2,893
BELEN	4,852	GRANTS-CIBOLA	3,566	QUEMADO	214
BERNALILLO	3,389	HAGERMAN	469	QUESTA	556
BLOOMFIELD	3,191	HATCH	1,556	RATON	1,442
CAPITAN	588	HOBBS	7,713	RESERVE	187
CARLSBAD	6,074	HONDO	136	RIO RANCHO	13,611
CARRIZOZO	196	HOUSE	147	ROSWELL	9,342
CENTRAL CONS.	6,950	JAL	421	ROY	70
CHAMA	470	JEMEZ MOUNTAIN	355	RUIDOSO	2,370
CIMARRON	567	JEMEZ VALLEY	483	SAN JON	162
CLAYTON	536	LAKE ARTHUR	162	SANTA FE	13,740
CLOUDCROFT	469	LAS CRUCES	23,911	SANTA ROSA	682
CLOVIS	8,305	LAS VEGAS CITY	2,109	SILVER CITY	3,350
COBRE CONS.	1,421	LOGAN	233	SOCORRO	2,013
CORONA	87	LORDSBURG	716	SPRINGER	211
CUBA	696	LOS ALAMOS	3,628	TAOS	3,207
DEMING	5,544	LOS LUNAS	8,680	TATUM	286
DES MOINES	143	LOVING	563	TEXICO	526
DEXTER	1,154	LOVINGTON	2,936	TRUTH OR CONSQ	1,544
DORA	231	MAGDALENA	444	TUCUMCARI	1,101
DULCE	681	MAXWELL	93	TULAROSA	1,043
ELIDA	141	MELROSE	248	VAUGHN	93
ESPANOLA	4,702	MESA VISTA	459	WAGON MOUND	165
ESTANCIA	919	MORA	622	WEST LAS VEGAS	2,001
EUNICE	575	MORIARTY	4,062	ZUNI	1,585
FARMINGTON	10,254	MOSQUERO	50	**STATE TOTAL**	**328,111**

ENROLLMENT FROM HIGH TO LOW
SCHOOL YEAR 2005-2006

DISTRICT	ENROLLMENT	DISTRICT	ENROLLMENT	DISTRICT	ENROLLMENT
ALBUQUERQUE	94,566	SOCORRO	2,013	MESA VISTA	459
LAS CRUCES	23,911	WEST LAS VEGAS	2,001	MAGDALENA	444
GADSDEN	14,245	POJOAQUE	1,991	JAL	421
SANTA FE	13,740	ZUNI	1,585	MOUNTAINAIR	375
RIO RANCHO	13,611	HATCH	1,556	JEMEZ MOUNTAIN	355
GALLUP	13,000	TRUTH OR CONSQ	1,544	FORT SUMNER	330
FARMINGTON	10,254	RATON	1,442	ANIMAS	291
ROSWELL	9,342	COBRE CONS.	1,421	TATUM	286
LOS LUNAS	8,680	DEXTER	1,154	FLOYD	253
CLOVIS	8,305	TUCUMCARI	1,101	MELROSE	248
HOBBS	7,713	TULAROSA	1,043	LOGAN	233
CENTRAL CONS.	6,950	ESTANCIA	919	DORA	231
ALAMOGORDO	6,489	PECOS	767	QUEMADO	214
CARLSBAD	6,074	LORDSBURG	716	SPRINGER	211
DEMING	5,544	CUBA	696	CARRIZOZO	196
BELEN	4,852	SANTA ROSA	682	RESERVE	187
ESPANOLA	4,702	DULCE	681	WAGON MOUND	165
MORIARTY	4,062	MORA	622	LAKE ARTHUR	162
LOS ALAMOS	3,628	PENASCO	619	SAN JON	162
GRANTS-CIBOLA	3,566	CAPITAN	588	GRADY	147
ARTESIA	3,503	EUNICE	575	HOUSE	147
BERNALILLO	3,389	CIMARRON	567	DES MOINES	143
SILVER CITY	3,350	LOVING	563	ELIDA	141
AZTEC	3,244	QUESTA	556	HONDO	136
TAOS	3,207	CLAYTON	536	MAXWELL	93
BLOOMFIELD	3,191	TEXICO	526	VAUGHN	93
LOVINGTON	2,936	JEMEZ VALLEY	483	CORONA	87
PORTALES	2,893	CHAMA	470	ROY	70
RUIDOSO	2,370	CLOUDCROFT	469	MOSQUERO	50
LAS VEGAS CITY	2,109	HAGERMAN	469	TOTAL	328,111

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PERCENT OF STUDENT ENROLLMENT ETHNIC CATEGORY BY DISTRICT * School Year 2005-2006

his sheet lists the percentage of students in ethnic groups in each public school district in New Mexico. It was compiled from data submitted by districts on the ccountability Data System (ADS), and is updated annually in January.

DISTRICT	% Anglo	% Hispanic	% Nat. Am.	% Black	% Asian	TOTAL
ALAMOGORDO	55.2	34.3	1.4	7.0	2.0	6,489
ALBUQUERQUE	34.1	54.5	5.1	3.9	2.4	94,566
ANIMAS	55.7	44.0	0.0	0.0	0.3	291
ARTESIA	45.0	53.3	0.3	1.2	0.2	3,503
AZTEC	63.9	21.9	13.1	0.5	0.6	3,244
BELEN	27.0	68.7	1.8	2.1	0.5	4,852
BERNALILLO	9.5	48.9	41.1	0.4	0.2	3,389
BLOOMFIELD	34.2	31.6	33.4	0.4	0.4	3,191
CAPITAN	71.3	26.0	1.2	1.2	0.3	588
CARLSBAD	48.1	48.7	0.8	1.8	0.6	6,074
CARRIZOZO	37.8	61.7	0.0	0.5	0.0	196
CENTRAL	8.1	2.3	89.2	0.3	0.1	6,950
CHAMA	13.2	84.3	1.9	0.4	0.2	470
CIMARRON	66.1	32.6	0.4	0.2	0.7	567
CLAYTON	49.4	48.9	0.9	0.6	0.2	536
CLOUDCROFT	88.5	9.8	1.1	0.4	0.2	469
CLOVIS	41.5	46.4	0.8	9.6	1.6	8,305
COBRE CONS.	11.5	86.1	1.3	0.8	0.3	1,421
CORONA	58.6	41.4	0.0	0.0	0.0	87
CUBA	6.6	31.5	61.6	0.1	0.1	696
DEMING	18.8	79.6	0.4	0.9	0.4	5,544
DES MOINES	60.1	38.5	0.0	0.7	0.7	143
DEXTER	27.1	72.7	0.0	0.2	0.0	1,154
DORA	76.2	23.4	0.0	0.4	0.0	231
DULCE	1.0	6.0	93.0	0.0	0.0	681
ELIDA	73.1	23.4	1.4	2.1	0.0	141
ESPANOLA	2.6	90.9	6.0	0.5	0.1	4,702
ESTANCIA	44.4	51.0	2.6	1.6	0.3	919
EUNICE	49.7	48.2	0.7	1.4	0.0	575
FARMINGTON	45.1	23.0	30.1	1.1	0.7	10,254
FLOYD	49.0	46.6	1.6	2.8	0.0	253
FT. SUMNER	56.4	42.4	0.0	1.2	0.0	330
GADSDEN	4.1	95.4	0.1	0.3	0.2	14,245
GALLUP	6.4	11.0	81.7	0.4	0.6	13,000
GRADY	87.8	10.9	0.0	1.4	0.0	147
GRANTS-CIBOL	19.0	40.3	39.2	1.0	0.5	3,566
HAGERMAN	35.2	64.4	0.2	0.0	0.2	469
HATCH	10.5	89.5	0.0	0.0	0.0	1,556
HOBBS	37.7	55.2	0.2	6.4	0.6	7,713
HONDO	8.1	89.7	0.7	1.5	0.0	136
HOUSE	64.0	34.0	0.0	1.4	0.7	147
JAL	41.3	58.4	0.0	0.2	0.0	421
JEMEZ MOUNTA	11.0	64.5	24.5	0.0	0.0	355
JEMEZ VALLEY	10.1	25.9	63.8	0.0	0.2	483
LAKE ARTHUR	27.2	72.8	0.0	0.0	0.0	162

DISTRICT	% Anglo	% Hispanic	% Nat. Am.	% Black	% Asian	TOTAL
LAS CRUCES	25.6	70.2	0.8	2.4	1.0	23,911
LAS VEGAS CITY	10.1	88.0	0.5	0.8	0.7	2,109
LOGAN	73.8	25.3	0.9	0.0	0.0	233
LORDSBURG	12.4	86.6	0.0	0.3	0.7	716
LOS ALAMOS	75.4	17.9	0.6	0.5	5.7	3,628
LOS LUNAS	28.2	62.6	7.5	1.3	0.5	8,680
LOVING	22.0	78.0	0.0	0.0	0.0	563
LOVINGTON	31.1	65.1	0.4	3.1	0.3	2,936
MAGDALENA	23.7	30.4	45.1	0.2	0.7	444
MAXWELL	55.9	43.0	0.0	1.1	0.0	93
MELROSE	85.9	13.7	0.4	0.0	0.0	248
MESA VISTA	10.0	87.2	2.0	0.7	0.2	459
MORA	4.8	95.0	0.0	0.0	0.2	622
MORIARTY	65.3	30.9	1.7	1.5	0.6	4,062
MOSQUERO	44.0	56.0	0.0	0.0	0.0	50
MOUNTAINAIR	26.7	68.3	1.6	2.9	0.5	375
PECOS	9.3	89.1	0.7	0.9	0.1	767
PENASCO	1.9	92.6	5.3	0.0	0.2	619
POJOAQUE	7.6	72.4	19.2	0.6	0.2	1,997
PORTALES	44.6	52.4	0.8	1.8	0.3	2,893
QUEMADO	69.2	16.4	13.6	0.9	0.0	214
QUESTA	18.9	79.0	0.7	1.3	0.2	550
RATON	36.7	61.9	0.5	0.4	0.6	1,443
RESERVE	55.1	38.5	6.4	0.0	0.0	187
RIO RANCHO	50.9	38.8	4.3	4.1	2.0	13,611
ROSWELL	34.2	62.2	0.4	2.6	0.7	9,343
ROY	67.1	32.9	0.0	0.0	0.0	73
RUIDOSO	42.6	38.7	17.1	0.9	0.7	2,377
SAN JON	65.4	32.1	1.9	0.0	0.6	160
SANTA FE	22.0	73.2	3.0	0.7	1.2	13,747
SANTA ROSA	4.6	94.1	0.6	0.2	0.6	685
SILVER CITY	43.8	53.3	0.9	1.3	0.8	3,355
SOCORRO	25.0	67.1	4.1	1.6	2.1	2,010
SPRINGER	35.1	64.0	0.0	1.0	0.0	211
TAOS	20.6	70.0	7.8	0.4	1.1	3,200
TATUM	44.4	54.9	0.0	0.4	0.4	281
TEXICO	56.8	40.1	0.0	3.0	0.0	527
TRUTH OR CONS	51.6	46.2	0.8	1.0	0.4	1,541
TUCUMCARI	33.2	62.6	0.4	2.2	1.7	1,101
TULAROSA	30.4	47.5	19.9	1.8	0.4	1,041
VAUGHN	4.3	93.6	2.2	0.0	0.0	93
WAGON MOUND	44.9	52.7	0.6	1.8	0.0	169
WEST LAS VEGA	5.7	93.1	0.3	0.8	0.2	2,009
ZUNI	0.6	0.1	99.2	0.1	0.0	1,587
STATE	31.1	54.0	11.1	2.5	1.3	328,117

APPENDIX F

LFC Requestor: Ron Segura

NEW MEXICO STATE DEPARTMENT OF EDUCATION 2003 AGENCY BILL ANALYSIS

Section I: General Information

		Date Prepared			Date Prepared
X	Original	1/24/03	__	Amendment	
__	Correction		__	Substitute	

BILL IDENTIFICATION:
House Bill # 115 Sponsor: Rep. W. Ken Martinez

Short Title: School Funding Formula

Reviewing Agency: New Mexico State Department of Education

Person Writing Analysis: Carla Acosta Phone 476-0198

E-Mail Address: cacosta@sde.state.nm.us

Section II: Fiscal Impact (Please indicate amounts in thousands, e.g., $100,000 will be $100.0)

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring	Fund
FY2003	FY2004	FY2003	FY2004	or Non-Rec	Affected
$	$	$	$		
$	$	$	$		
$	$	$	$		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE

Estimated Revenue FY2003	Estimated Revenue FY2004	Subsequent Years Impact		Recurring or Non-Rec	Fund Affected
$	$	$	$		
$	$	$	$		
$	$	$	$		

(Parenthesis ( ) Indicate Revenue Decreases)

Section III: Relationship To Other Legislation or General Appropriation Act (Please underline)

Duplicates/Conflicts with/Companion to/Relates to None known

Section IV: Narrative

1. BILL SUMMARY (Two Parts)

a) Synopsis.

House Bill 115 would amend the Public School Finance Act [§22-8-25, NMSA 1978] to:

(1) Change the percent of federal Impact Aid receipts the state takes into consideration in calculating the State Equalization Guarantee (SEG) from 75% to 60% from July 1, 2003, to June 30, 2004;

(2) Change the percent of federal Impact Aid receipts the state takes into consideration in calculating the SEG from 60% to 45% from July 1, 2004, to June 30, 2005;

(3) Change the percent of federal Impact Aid receipts the state takes into consideration in calculating the SEG from 45% to 30% from July 1, 2005, to June 30, 2006;

(4) Change the percent of federal Impact Aid receipts the state takes into consideration in calculating the SEG from 30% to 15% from July 1, 2006, to June 30, 2007;

(5) Change the percent of federal Impact Aid receipts the state takes into consideration in calculating the SEG from 15% to 0% beginning on July 1, 2007 and in subsequent years.

(b) Significant Issues.

Based on the reduction of impact aid credits to 45% for Fiscal Year 2005, HB 115 would affect the state's ability to qualify as an equalized state for the purpose of taking credit for Impact Aid funds in the calculation of the SEG because the state would no longer be able to meet the disparity test set forth in federal law; therefore, no impact aid credit could be taken.

Because of the statutory provisions of New Mexico's public school funding formula, New Mexico has, in prior years, qualified under federal Impact Aid requirements (20 USCS § 7709(b)(1)) as an equalized state and has been allowed to consider eligible Impact Aid receipts in determining the amount of state aid to public school districts.

Currently, the state takes 75% credit of all local and federal revenues as required in the Public School Finance Act (§ 22-8-25 NMSA 1978). The state takes credit for only the operational portion of the Impact Aid funds, which translates to 57.8% of total Impact Aid payments. Not considered in the calculation of state aid are 42.2% of total Impact Aid payments (see Chart 1).

If HB 115 were enacted, New Mexico would no longer qualify under federal law to take credit for eligible Impact Aid revenues because the state would no longer meet the disparity test required by federal law. If the 45% Impact Aid credit had been in effect when the state submitted its disparity calculation for 2002-2003, the state would not

have been certified to take credit for Impact Aid receipts (see Table 1).

2. PERFORMANCE IMPLICATIONS (How bill will affect performance of relevant agency programs)

Without additional state funding, the proposed amendments in HB 115 would reduce the unit value, causing a majority of the school districts to experience a loss of operational revenue. The affected school districts would have fewer resources to meet their performance measure targets.

3. FISCAL IMPACTS (Can SDE or public schools absorb increase/decrease?)

Passage of HB 115 would require the 2004 Legislature to appropriate a projected additional $48,845.0 of general fund revenue to the SEG to make up for the loss in Impact Aid credits and thereby maintain current unit value. Otherwise, the unit value for all school districts would have to be reduced proportionally to make up the loss to the SEG. (See Table 2, which provides a breakdown of the projected loss to individual districts based on 2001-2002 actual distributions.)

4. ADMINISTRATIVE IMPLICATIONS (Short or long-term impact on SDE, public schools or changes to FTE)

None.

5. DUPLICATION, CONFLICT, COMPANIONSHIP OR RELATIONSHIP (Cite laws or bill #s)

None known.

6. TECHNICAL ISSUES (Corrections)

Sections 22-8-25B, C(1) and C(2) should be amended to reflect the actual procedure of budgeting the corresponding additional state revenues that are received by districts as a result of the reduction in the credits from 95% to the current 75% that is directed toward capital outlay.

7. SUBSTANTIVE ISSUES (Conflicts with existing policy or programs)

Section 8009 of the Act (20 U.S.C. §7709(a)) sets forth the general prohibition against a state's considering impact aid payments in determining eligibility for state aid or the amount of such state aid; subsection (b) sets forth the mechanism for qualifying as an equalized state. A state so qualifying may take basic impact aid payments into consideration in determining the relative resources available to local educational agencies in the state and the financial resources of such agencies. Eligible impact receipts may be taken into consideration (equalized) only in the same proportion as local tax receipts. The legislative history clearly supports the underlying intent of the provision allowing equalized states to take credit for impact aid receipts so as to do away with the impediment to state actions designed to "remove the often close relationship between values of property and quality of education in a school district." Inasmuch as no school district in New Mexico relies upon its property tax base to fund its operational expenses, HB 115 would essentially allow a district receiving impact aid revenue to receive the benefit of the SEG distribution and the benefit of payments designed to compensate for the federal presence.

If New Mexico were unable to take credit for Impact Aid receipts, the SEG would be reduced by an estimated $48,845.0 (see Chart 1 and Table 3) for the school year

2004-2005. Impact Aid districts would realize an increase of over $80,000.0 in operational revenues to use at their discretion. This change could have a significant deleterious effect on the SEG Formula as it is now constituted.

In addition, the corresponding additional state revenues that are received by impact aid districts as a result of the reduction in the credits from 95% to the current 75% and directed toward capital outlay would be nullified. As a result of New Mexico's failure to qualify as an equalized state, each Impact Aid recipient district would be able, according to federal law, to expend its Impact Aid for any legally permissible purpose.

8. ALTERNATIVES

Retain the current statute as amended and enacted.

9. WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

The state will continue to take 75% credit of all local and federal revenues as required in the Public School Finance Act (§ 22-8-25 NMSA 1978) in calculation of the SEG, and districts will continue to budget 20% of the additional state revenue received as a result of the reduction in the credits for capital outlay expenditures.

10. AMENDMENTS

See paragraph 6, above.

APPENDIX G

LFC Requestor: Ron Segura

NEW MEXICO STATE DEPARTMENT OF EDUCATION 2003 AGENCY BILL ANALYSIS

Section I: General Information

		Date Prepared			Date Prepared
X	Original	2/11/03	__	Amendment	
__	Correction		__	Substitute	

BILL IDENTIFICATION:
House Bill # 637 Sponsor: Rep. Terry T. Marquardt

Short Title: Allow School Districts to Keep Federal Money

Reviewing Agency: New Mexico State Department of Education

Person Writing Analysis: Carla Acosta & Arlene Strumor Phone 476-0198

E-Mail Address: cacosta@sde.state.nm.us and astrumor@sde.state.us

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Section II: Fiscal Impact (Please indicate amounts in thousands, e.g., $100,000 will be $100.0)

APPROPRIATION

Appropriation Contained		Estimated Additional Impact		Recurring	Fund
FY2003	FY2004	FY2003	FY2004	or Non-Rec	Affected
$	$0.0	$	$62,000.0	Recurring	GF
$	$	$	$		
$	$	$	$		

(Parenthesis ( ) Indicate Expenditure Decreases)

REVENUE

Estimated Revenue FY2003	Estimated Revenue FY2004	Subsequent Years Impact		Recurring or Non-Rec	Fund Affected
$	$	$	$		
$	$	$	$		
$	$	$	$		

(Parenthesis ( ) Indicate Revenue Decreases)

Section III: Relationship To Other Legislation or General Appropriation Act (Please underline)

Duplicates/Conflicts with/Companion to/
Relates to HB115 and HB483

Section IV: Narrative

1. BILL SUMMARY (Two Parts)

a) Synopsis.

HB 637 would amend the Public School Finance Act [§22-8-25, NMSA 1978] to allow school districts to keep 100 percent of their Federal Forest Reserve and Impact Aid revenue.

b) Significant Issues.

HB 637, if enacted, will remove the state's ability to take credit for federal revenue (currently defined as 75 percent of a school district's share of Forest Reserve funds and eligible Impact Aid receipts) in determining state aid. Under the provisions of the bill, the state will continue to take credit for 75 percent of local revenue, which is defined as the .5 mill levy.

HB 637 will, in the instance of some districts receiving Federal Forest Reserve and/or Impact Aid funds, increase the funds available for operational expenditures within those school districts as a result of the removal of Federal Forest Reserve and Impact Aid credits. The effect of removing the credits for federal revenue for SEG purposes will be to increase the revenues available for operational expenditures in some but not all of those districts receiving Impact Aid and Forest Reserve revenues. Unless the Legislature appropriates an additional amount equal to the federal revenues for which credit is taken, most school districts will experience a corresponding decrease in SEG for operational expenditures (see Table 1).

If HB 637 is enacted, significant disequalization within the state will occur with regard to funds available to school districts for operational expenditures. Districts receiving Impact Aid payments will derive the benefit from their impacted property tax base by virtue of the payments in lieu of taxes. Under current law, the .5 mill levy limits the ability to other school districts in the state to access their property tax base for operational purposes; HB 637 requires the state to continue to take credit for 75 percent of those revenues.

2. PERFORMANCE IMPLICATIONS (How bill will affect performance of relevant agency programs)

- Without additional state funding, the proposed amendments in HB 637 would reduce the unit value, causing most of the school districts to experience a loss of operational revenue. The affected school districts would have fewer resources to meet their performance measure targets.

3. FISCAL IMPACTS (Can SDE or public schools absorb increase/decrease?)

Passage of HB 637 would require the 2004 Legislature to appropriate approximately $62,000.0 in additional General Fund revenue to the SEG to compensate for the loss in Federal Forest Reserve and Impact Aid credits in order to maintain current unit value. Otherwise, the unit value for all school districts would have to be reduced proportionally to make up the loss to the SEG.

4. ADMINISTRATIVE IMPLICATIONS (Short or long-term impact on SDE, public schools or changes to FTE)

None apparent.

5. CONFLICT, DUPLICATION, COMPANIONSHIP OR RELATIONSHIP (Cite laws or bill #s)

HB 637 relates to HB 115 and HB 483. The Impact Aid portion of HB115 would reduce over a period of years the percent of federal Impact Aid receipts the state could take into consideration in calculating the SEG. HB483 caps the amount of federal Impact Aid receipts that could be used by the state in calculating the SEG.

6. TECHNICAL ISSUES (Corrections)

None.

7. OTHER SUBSTANTIVE ISSUES (Conflicts with existing policy or programs)

- If New Mexico no longer takes credit for Federal Forest Reserve and Impact Aid receipts, the SEG will be reduced for the school year 2003-2004. Federal Forest Reserve and Impact Aid districts will realize approximately $66,000.0 to use at their discretion (100 percent of Federal Forest Reserve and eligible Impact Aid revenue). This change could have a significant deleterious effect

on the State Equalization Funding Formula as it is now constituted and may result in a challenge to the public school finance structure as not meeting the requirement set forth in Article XII, Section 1, of the Constitution of New Mexico for a "uniform system of free public schools."

- In the absence of additional state revenues to support the unit value, districts, other than those impacted districts receiving significant impact aid revenues, will experience decreases in revenues available for operational expenditures. In addition, a number of districts receiving impact aid revenues for which credit is no longer being taken will nevertheless experience overall decreases in revenues available for operational expenditures. Based on 2001-2002 data of the 31 districts currently receiving impact aid payments, 18 of the districts would experience an overall decrease in revenues available for operational expenditures. See Table 1 (attached).

- As a result of New Mexico's failure to qualify as an equalized state, each Impact Aid recipient district would be able, according to federal law, to expend its Federal Forest Reserve and/or Impact Aid for any legally permissible purpose. Table 1 illustrates the net effect for each district's operating subfund.

- Revenues for capital outlay needs will also be affected since the requirement that revenues equal to 20% of Federal Forest Reserve and/or Impact Aid funds be designated for capital outlay would not be applicable. Thus, impacted districts must identify another source of revenue for local match requirements if HB455 is enacted.

8. ALTERNATIVES

Retain the current statute as amended and enacted.

9. WHAT WILL BE THE CONSEQUENCES OF NOT ENACTING THIS BILL?

The state will continue to take 75% credit of all local and federal revenues as required in the Public School Finance Act (§ 22-8-25 NMSA 1978) in calculation of the SEC, and districts will continue to budget 20% of those revenues for capital outlay expenditures.

10. AMENDMENTS

None.

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Supreme Court, U.S.
FILED
MAY 9 - 2007
OFFICE OF THE CLERK

No. 05-1508

In the Supreme Court of the United States

ZUNI PUBLIC SCHOOL DISTRICT NO 89
AND GALLUP-McKINLEY COUNTY PUBLIC
SCHOOL DISTRICT NO 1

Petitioners,

v

UNITED STATES DEPARTMENT OF EDUCATION,

Respondent,

NEW MEXICO STATE DEPARTMENT OF EDUCATION,

Intervenor

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR REHEARING

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The Church of the Holy Trinity v United States,
143 U S 457 (1982) 3, 9

Zuni Public School District No 89 v U S Dept of Education, et al ,
393 F 3d 1158 (10th Cir 2004) (vacated) 5

OTHER:

Journal of Law, Probability and Risk (2006) Vol 5, 33-61 (Advanced Access Publication January 15, 2007) "A 60 Million Dollar Statistical Issue Arising in the Interpretation and Calculation of a Measure of Relative Disparity Zuni Public School District 89 v U S Department of Education" 4

ARGUMENT

The Petitioners respectfully request pursuant to Supreme Court Rule 44 that this Court grant a rehearing and reconsideration of the majority's ruling as issued on April 17, 2007 (550 U S ___ (2007))

1

The majority and the dissenting Justices all agree that the question whether the Secretary's 1996 regulatory version of the 25% disparity formula established by Congress in 1994 is valid turns on whether the statutory formula requires that the disparity test be applied to a ranking, an array or a distribution of LEAs based on each LEA's average per-pupil expenditures or revenues after excluding those LEAs whose average revenue or expenditure values fall above the 95th or below the 5th percentiles of that array (in which case the Secretary's formula is not valid), or whether the statutory formula permits that test to be applied to this same ranking, array or distribution of LEA's after weighting each LEA by their number of pupils This is equivalent to a calculation based on an assumption that each pupil within an LEA receives identical funding[1] (in which case the Secretary's formula is valid)

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[1] As the State admitted, (Resp Br at 37-41) the Secretary's formula produces the same result as (and thus is the mathematical equivalent of) a formula which applies the disparity test to a ranking, an array or a distribution of pupils based on a (hypothetical) per-pupil annual revenue or expenditure after excluding those pupils whose revenue or expenditure values fall above the 95th or below the 5th percentiles of that array

The majority determined that the statute could be read to permit the Secretary to make the disparity determination by using the number of pupils as a weighting factor in the ranking of LEAs by their average revenue or expenditure rather than using the unweighted ranking of LEAs by their average revenues or expenditures

The dissenting Justices firmly concluded that the statute requires this disparity determination to be made based on an array, ranking or distribution of LEAs not on the basis of an array, ranking or distribution of individual students

A compelling factor underlying the majority opinions was a belief in the superiority of the Secretary's formula over the statutory formula Additionally, Justice Breyer's opinion and the concurring opinions of Justices Kennedy and Alito found an ambiguity in the statute which is relied upon to avoid a conflict with *Chevron U S A , Inc v Natural Resources Defense Council, Inc* , 467 U S 837 (1984) [2] Justice Stevens

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[2] The drafters had before them a legislative and regulatory history which described two distinct formulae for determining permissible per student disparity among LEAs - one formula was ultimately embodied in 1976 regulation which included the percentile of student populations and a competing formula, subsequently adopted in the 1996 statute, where this additional step is purposefully omitted The necessary suggestion of the majority is that Congress was inattentive and allowed a Secretary, who purportedly drafted the statutory formula as an embodiment of his regulation formula, to utterly fail in the effort, calling for the majority's judicial rescue However, Congress was active in the 1994 legislative effort in this area, leading to the conclusion that the statutory language was intentional The prior "wealth and neutrality test" which measured the tax burden of all tax payers in the state and the "special circumstances test" which allowed for specific exemptions, were

invoked *The Church of the Holy Trinity v United States*, 143 U S 457, 459 (1982) in his concurring opinion [3]

Justice Breyer's Opinion, however, noted a belief that the statutory provisions establishing the disparity formula were complicated and implied that a different result might be warranted if in the view of professional statisticians the statutory language could not properly be read to permit the formula adopted by the Secretary

> Finally, we draw reassurance from the fact that no group of statisticians, nor any individual statistician, has told us directly in briefs, or indirectly through citation, that the language before us cannot be read as we have read it The circumstance is significant, for the statutory language is technical, and we are not statisticians and the views of experts (or their absence)

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both eliminated by Congress, leaving only the "disparity test" which was before this Court Further, the House version of the bill provided for only a 10% disparity standard H R 6, 103rd Cong (1994), *see also*, H R Rep No 103-495 at 2887 The Senate version (S 1513, 203rd Cong (1994) at Section 9010 would leave the Secretary with his former powers S Rep No 103-292 at 44,98 Following a conference, the House version dropped the disparity percentage from 25% to 20% for the fiscal years 1998 and 1999 H R No 103-761 (1994) (Conf Rep at 798-799) Subsequently, however, Senator Kassebaum from Kansas, one of the three states that still takes credit for Impact Aid, added an amendment to another bill keeping the 25% disparity percentage Pub L No 104-195, 110 Stat 2379

[3] Justice Stevens' concurring opinion agreed that "Petitioners literal reading of the statutory test was correct," but the language did not reflect Congress' intent, citing (at fn 3) *The Church of Holy Trinity, supra*

might help us understand (though not control our determination) what Congress had in mind *Id* at p 17

A recent paper published by a professional statistician in a peer reviewed journal one week after the January 10, 2007 oral argument, and before the ruling of this Court, contains a detailed analysis of the Impact Aid statute focusing on what disparity formula is required by the statute That analysis flatly rejects the Secretary's formulation

On January 15, 2007, five days after oral argument, Professor Joseph L Gastwirth, Ph D, Department of Statistics, George Washington University, Washington, D C ,[4] published his paper on line in the Journal of Law, Probability and Risk (http //lpr oxfordjournals org/cgi/content/abstract/5/1/33) It is entitled "A 60 Million Dollar Statistical Issue Arising in the Interpretation and Calculation of a Measure of Relative Disparity Zuni Public School District 89 v U S Department of Education "[5]

The paper addressed and rejected the two underpinnings of the majority's later opinions First, it confirms that

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[4] www gwu edu\~stat\gastwirth htm

[5] (Law, Probability and Risk (2006), Vol 5, 33-61 Advanced Access publication on January 15, 2007) The research was conducted independently of both sides in this litigation However, as reflected in Dr Gastwirth's acknowledgments, both sides of this litigation did respond to Dr Gastwirth's request for material Dr Gastwirth's 1988 publication cited in fn 28 of his paper has been cited by the Federal Judicial Center's Reference Manual on Scientific Evidence http //www fjc gov/public/pdf nsf/looku/sciman00 pdf/$file/sciman00 pdf

Congress' statutory formula is explicit and self-contained and that the Secretary's formula cannot be reconciled with the statute Second, it dispels the assumption that the Secretary's formula is so superior to the statutory formula that Congress' views on the issue as expressed in the statute should be disregarded

Dr Gastwirth thoroughly examined the statutory interpretation issues presented in this case "from the perspective of a statistician " Gastwirth, *supra*, at p 4 He conducted one informal survey of statisticians and another survey of seminar attendees at his talk in September of 2006 at Columbia University on how they would read and interpret the statutory formula if called upon to implement it and "virtually all agreed, conceptually, with the Plaintiffs' primary interpretation and the dissenting opinion by Judge O'Brien," from the Tenth Circuit's vacated original opinion *Id* at p 4 *See, Zuni Public School District No 89 v U S Dept of Education, et al* , 393 F 3d 1158 (10th Cir 2004) (vacated) (Pet App 22a-33a) Dr Gastwirth was clear that "the [Secretary's] regulation emphasizes that percentiles will be determined on the basis of number of pupils and not on the number of districts" and that "the number of pupils in a district is not mentioned in the new statute, much less used to determine the 5th and 95th percentiles " *Id* at p 6 He explains his analysis as a statistician

> To a statistician, the statute specifies a population of LEAs, the individual units, and the characteristic of interest is the average per-pupil expenditure (AE) of the LEA By arranging the LEAs in increasing order of the[illegible]enditures, we obtain the distribution of the AEs in [illegible]e universe of LEAs in the state (see Appendix A for details) The disparity calculation is made by first taking difference, D, say, between the

> 95th percentile ($E_{0\,95}$) and the fifth percentile ($E_{0\,05}$) of the AEs of the LEAs The 95th and 5th percentiles are used in the calculation as the statute clearly states that LEAs with expenditures (or revenues) *above* the 95th percentile or *below* the 5th percentile should be disregarded Then the disparity measure is the ratio of D to $E_{0\,05}$ Since one has data for the entire population, one determines the percentiles from the formula appropriate for the data from the complete population *Id* at p 9

Dr Gastwirth then explains that both the statutory formula and the Secretary's regulation formula have flaws depending upon the number of LEAs, the size of the LEAs and the ranking of the LEAs (*Id* at p 10 and p 16) He then poses rhetorically "if Congress wanted to use the pupil population in the various districts to contribute to the disparity measure, one can ask why it did not use the [average per-pupil expenditure] in the State as the denominator of the measure " *Id.* at p 10

Dr Gastwirth also suggests that since the 1994 statute allowed "the Department to adjust the expenditure data to account for special situations many 'anomalous' aspects of the data should be removed in this process Hence, one might question whether any of the adjusted data should be deleted " This in turn throws into question the regulation formula which in New Mexico eliminates 24% of the LEAs from the calculation, a draconian trimming within its context Again, at page 11, Dr Gastwirth commented that his informal surveys of statisticians provided "some insight into the way statisticians react to the statute and indicates that the description given at the beginning of the section is quite standard " Dr Gastwirth points out that the DOE alternative formula itself allows "a very large disparity in one category

of schools to be masked by small disparities in other categories " He then asks, again rhetorically "Given the purpose of the federal government's funding of education in impacted areas, did Congress intend that a statute with the objective of insuring that a state has an equalization program and does not even mention grade levels allow one large category of schools (or districts) to have a disparity greater than 50% " *Id* at p 14 Further, use of data on per-student expenditures or revenues by school would far more accurately reflect a true disparity measure, which "undercuts the argument" that the regulation formula "reflects an approximation of the true disparity in per-pupil expenditures in the state " (*Id* at p 15)

Dr Gastwirth again questions (*Id* at p 16) the appropriateness of the regulation's formula, as given the elimination of anomalies allowed by the statute " the per pupil expenditures should be reasonably equal if the state had an equalization program in effect " (New Mexico has more than a 200% disparity between the top ranked LEA and lowest ranked LEA after anomalies are eliminated) Pointing further to problems with both Congress' and the Secretary's formula, Dr Gastwirth notes that "since the true equalization program should be concerned with the funds available to educate children in the poorest districts, the deletion of the lowest 5% of the adjusted revenue or expenditure data appears inconsistent with the stated purpose of the law " *Id* at p 16 Without knowing of Justice Breyer's wish for professional assistance, Dr Gastwirth coincidentally offers it *Id* at p 19 Again, the clarity of the statutory formula is reinforced

> Since the new law specifies the disparity formula, rather than preserving the wording of the department's previous formula, the weight that should be given to

> the department's unchanged interpretation of the disparity calculation is a legal issue If the court decides that the definition of a percentile is considered a term of art, then the interpretation given by professional statisticians and statistical textbooks and treatises should be seriously considered In our informal survey and discussion at a seminar at Columbia University, statisticians do not have much difficulty in interpreting the pertinent part of the statutory formula *Id* at p 19

Dr Gastwirth then highlighted a variety of problems with the Secretary's formula as set out in the 1996 regulations "The DOE formula can also fail to remove data from LEAs with anomalous characteristics " *Id* at p 19 "The alternative calculation proposed by DOE that combines the disparities for LEAs with the different grade-level groupings tends to decrease the calculated disparity Thus, it is easier for a state in which school districts are organized by grade levels to pass the criterion " *Id* at p 19 Further, "the use of highly aggregated data to assess per pupil expenditure inequality leads to an under-estimate of the inequality and per-pupil expenditures " *Id* at p 20 Again, Dr Gastwirth notes the inequity in deleting the lowest 5% of the data (a problem with both formulas) "if one desires to insure a basic minimum education for all pupils " Citing the relevant statistical literature, Dr Gastwirth comments that the data itself is skewed rather than symmetrical, making a symmetrical trimming "not appropriate for assessing spread or relative disparity " *Id at p 20*

Dr Gastwirth concludes by questioning the value and legitimacy of the regulation formula

> While it is unreasonable to expect the formulas stated in either the 1976 or the current DOE regulations to be perfect, the fact that there are several statistically questionable aspects suggests that in using its expertise the department did not make a thorough examination of the relevant statistical literature If courts are to defer to the "expertise" of a governmental agency when interpreting a statute, at a minimum they should check that a reasonable degree of expertise is reflected in the regulations *Id* at p 20

The conflict between the clear and compelling arguments of Justice Scalia's dissent and the claim of the majority of having divined a Congressional intent not reflected in any legislative or regulatory history or statutory language can only be reconciled by concluding that the majority believes that the regulation formula is rescued by some overpowering public policy furthered by the regulation which the Congress' formula fails to advance Perhaps if this were true, and if we had a different system of government founded on *The Church of the Holy Trinity* by which the Justices of this Court (or the Secretary) were free to substitute their judgments for that of the Congress, the majority's decision might be justified But as clearly shown by Dr Gastwirth's analysis this is not one of those instances, as the regulation formula is flawed conceptually and in practice and certainly does not justify the wound which the majority inflicts upon *Chevron* Congress should be taken at its unambiguous word

CONCLUSION

Petitioners respectfully pray that this Court grant reconsideration of this matter and reject the Secretary's formula as inconsistent with the statute

Respectfully submitted,

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CERTIFICATION

The foregoing is restricted to the grounds specified in 44 2 S Ct R and it is presented in good faith and not for delay

Ronald J. VanAmberg Jr

Ronald J VanAmberg
Counsel of Record for Petitioner